TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted] 16.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE LARABEE FLOUR MILLS COMPANY, A PARTNERSHIP COMPOSED OF F. D. AND F. S. LARABEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JANUARY [redacted], 1907.

(20,650.)

(20,550.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 585.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE LARABEE FLOUR MILLS COMPANY, A PARTNERSHIP COMPOSED OF F. D. AND F. S. LARABEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Affidavit for writ of mandamus	2	1
Alternative writ of mandamus	7	4
Sheriff's return	9	6
Plea in abatement	11	6
Demurrer to plea in abatement	15	8
Motion for leave to amend plea	17	9
Amended plea	18	9
Order granting leave to amend	21	11
Order taking demurrer under advisement	23	12
Order denying motion for leave to amend and sustaining demurrer	25	12
Answer and return to alternative writ of mandamus	27	13
Order appointing commissioner to take testimony, &c	33	16
Findings of fact	35	17
Rules and instructions to agents of Missouri Valley Car Service Association, January 1, 1904	44	24
Order as to filing briefs and fixing date of hearing	53	28
Withdrawal of part of application asking the issue of certain bills of lading	55	28
Application of plaintiff to be awarded costs, &c	56	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 1, 1907.

	Original.	Print.
Order of argument and submission	58	29
Judgment	60	30
Syllabus	62	31
Opinion	64	32
Plaintiff's claim for damages	80	42
Schedule A—Statement of account	82	44
Clerk's certificate to transcript	84	46
Petition for writ of error	86	47
Order allowing writ of error	88	48
Assignment of errors	90	48
Order granting writ of error, &c	94	50
Bond on writ of error	95	51
Writ of error	98	52
Citation and service	102	53
Clerk's certificate as to writ-of-error papers	104	54
Return to writ of error	105	54

1 In the Supreme Court of the State of Kansas.

Be it remembered, That on the 15th day of September, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of Kansas a petition for the alternative writ of mandamus, which petition is in the words and figures as follows, to-wit:

2 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, a Partnership, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Affidavit for the Writ of Mandamus.

STATE OF KANSAS, *County of Shawnee, ss:*

F. D. Larabee being first duly sworn, upon his oath deposes and says, that he is a member of the co-partnership doing business under the firm name of The Larabee Flour Mills Company, and that he, with F. S. Larabee are the partners constituting the said firm; that the plaintiff, the Larabee Flour Mills Company, has been engaged for several years past in the milling business at the City of Stafford, in the County of Stafford, in the State of Kansas, and is the owner and proprietor of a flouring mill of the capacity of about one thousand barrels of flour per day, with elevators for the storage of all kinds of grain, and has been engaged in the operation of said mill, and in the manufacture of flour, in its sale and shipment to any place, country or customer purchasing the same, and has been engaged in the purchase and sale of grain in connection with said mill, and in the storage of said grain and the shipment thereof to purchasers thereof, to many places and customers for several years last past, and that the said mill and its milling and elevator business are operated throughout the year at or near its maximum capacity and aggregating about one and one half millions of dollars of such business for the year.

That said mill and elevator is situated on the line and tracks of the defendant company, a railway corporation, doing a railway business at the City of Stafford in Stafford County, Kansas; that the line of the Atchison, Topeka and Santa Fe Railroad Company crosses the line of defendant company at said City of Stafford, and that the said Atchison, Topeka and Santa Fe Railroad Company several years ago, built a side track from its own line to a connection with the line and tracks of the defendant at said City of Stafford, and
3 which transfer track was the only track by which cars could be transferred from one of these railroads to the other, and that for three years last past, cars empty and loaded on the Atchison, Topeka and Santa Fe Railway Company tracks from points on its line destined for the mill and elevator of the plaintiff were trans-

ferred by the defendant company to its mill and milling tracks and returned after being loaded or unloaded over the said transfer track into the possession of the Atchison, Topeka and Santa Fe Railway Company to complete the shipment or journey, and for which service the defendant company charged the plaintiff two dollars for each car taken from the other line, and returned again, after being loaded or unloaded as the case might be; that the milling and elevator business was carried on under such arrangement for over three years as aforesaid, and the business of the plaintiff was extended over the line of the Atchison, Topeka and Santa Fe Railway Company and steadily increased in volume and amount over the line of that railway, and the only means of handling, receiving or sending loaded or unloaded cars over that line was by means of a transfer thereof over such transfer track and by no other practicable or reasonable route or transfer; and that the said transfer line was built and maintained for the purpose of transfer of cars from one line to the other, and that the milling and elevator business of the plaintiff had been built up and extended over the lines of the Atchison, Topeka and Santa Fe Railway Company not only upon the right to use such transfer tracks in the transfer of cars, loaded and un- (?) over it between the two and all which the defendant company consented to, maintained and carried out, until on or about the 29" day of August 1906, when it refused to make any other or further transfers of cars over said transfer track for the plaintiff, for the one excuse that the plaintiff had not paid its bills for demurrage on cars and which plaintiff avers was wholly an independent and unconnected matter so far as the said transfer track or business over it is concerned; and the plaintiff further avers that the plaintiff has at all times paid promptly for all service by the defendant company over said transfer track, the charges established by it for such service.

4 This affiant further states, that the traffic in grain handled by the defendant company at its station at the said City of Stafford has for several years last past exceeded over one hundred cars of grain each calendar year shipped and transported over its tracks at said station, that it has at said station a track or car scales, of sufficient capacity, for weighing grain in car load lots, and in the car; that the defendant company has at all times refused to weigh any and all cars of grain transported by it for plaintiff and has at all times compelled the plaintiff to accept bills of lading on every car of grain shipped over its line, in which is stated that the defendant company was not liable for damages or shortage thereto, and refuses to issue to the plaintiff bills of lading on any other condition or terms whatever.

This affiant further alleges, under oath, that the defendant company owes the duty to the plaintiff to transfer cars over said transfer track, and which it refuses to do, and to the serious damage and loss to the plaintiff in the transaction of its daily and constant business at its mill and elevator; that the defendant company owes the duty to the plaintiff to receive its shipments of grain in car load lots

without exacting from the plaintiff, that it will not be responsible for loss or damage in the carrying of the same, and that such exacting conditions are in violation of law, and that the plaintiff has the right to demand the carriage of its grain in car load lots without being required to ship on such illegally and unlawfully exacted terms.

This affiant further avers that the plaintiff has no plain, speedy or adequate remedy in the ordinary course of the law, for the injuries herein complained of.

Wherefore, the plaintiff and this affiant for and on behalf of the plaintiff, prays that a peremptory writ of mandamus may be allowed and issued by the Supreme Court of the State of Kansas, or by one of the Judges thereof, directed to the defendant company, commanding the defendant company, upon the payment of the ordinary charges therefor, to transfer grain cars, loaded and unloaded with flour, grain or mill stuffs, to and from and over the transfer track connecting its line with the line of the Atchison, Topeka and Santa Fe Railway Company at its station at the City of Stafford, in the County of Stafford and State of Kansas, for the plaintiff
5 and from time to time hereafter; that it may be likewise compelled by said peremptory writ of mandamus to receive from the plaintiff car loads of grain, flour and mill stuffs at said station, without exacting the conditions for such shipments that it will not be liable for loss or damage in such shipments if the same exceeds one fourth of one per cent. of the amount of flour, grain or milling stuffs put in the cars and each of them so shipped; or that the defendant company by some short day to be set by the Court for that purpose, show cause, if any it has, why it has not done so, and further this affiant saith not, So help him God!

F. D. LARABEE.

Subscribed and sworn to before me, this 11th day of September 1906.

[SEAL.] F. C. KATHS,
Notary Public, Stafford County, Kansas.

My commission expires 5th day of April 1909.

Endorsed: No. 15,167. In the Supreme Court of the State of Kansas. The Larabee Flour Mills Company, a partnership, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Affidavit for the writ of mandamus. Waters & Waters Attorneys for Plaintiff. Filed Sep. 15 1906 D. A. Valentine Clerk Supreme Court.

6 And afterwards, on the 19th day of September, 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas the copy of the alternative writ of mandamus showing the service of said writ by the sheriff of Shawnee county upon the defendant herein which said alternative writ, together

with the sheriff's return and the endorsements thereon is in words and figures as follows, to-wit:

7 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Alternative Writ of Mandamus.

The State of Kansas, to the defendant, The Missouri Pacific Railway Company, Greeting:

Whereas, it has been represented to the Supreme Court of the State of Kansas, by an affidavit on the part of the plaintiff in above entitled action, that the plaintiff, a co-partnership composed of F. D. Larabee and F. S. Larabee has been engaged in owning and operating a mill and elevators, and in the purchase, sale and shipment of grain, flour and feed stuffs in connection therewith for several years last past, at the City of Stafford in the County of Stafford, in the State of Kansas, and that its mill and elevators are situated upon the tracks of the defendant company, a railway corporation, and that there is a transfer track built from a connection with the tracks of the Atchison, Topeka and Santa Fe Railway Company to a connection with the tracks of the defendant at its station at said City of Stafford, and that for three years last past, the defendant has continuously until the 29th day of August 1906, by its engines, taken and transferred cars, loaded and unloaded, from said transfer track and from the Atchison, Topeka and Santa Fe Railway Company, and delivered them to the plaintiff at its mill and elevators, and upon request of the plaintiff to return such cars, loaded and unloaded over said transfer track again into the possession of the said Atchison, Topeka and Santa Fe Railway Company and that the defendant charged for such transfer service, of receiving and returning said cars, the sum or price of two dollars per car, and that on the 29th day of August 1906, the defendant refused to further make any transfer of cars over said transfer track, without reasonable excuse therefor; that the plaintiff at all times had promptly paid for such service; that it had extended its business over the line of the Atchison, Topeka and Santa Fe Railway Company, and that said transfer track is the only practicable
8 means of receiving or sending cars or receiving or sending shipments of grain, flour and mill stuffs, from or to customers on the line of the Atchison, Topeka and Santa Fe Railway Company, and that the refusal of the defendant to continue to transfer cars over such transfer track is to the serious damage and loss of the plaintiff, in the transaction of its daily and constant business at its mill and elevators, and it is further so represented that the defendant owes the duty to the plaintiff to transfer cars over said transfer track to and from a connection with its mill and elevators and to and from the Atchison, Topeka and Santa Fe Railway.

And it has been further so represented that the traffic in grain handled by the defendant at its station at the said City of Stafford, has for several years last past exceeded over one hundred cars of grain each calendar year shipped and transported over its track at said station; that it has at said station a track or car scales of sufficient capacity for weighing grain in car load lots and in the car; that the defendant has at all times refused to weigh any and all cars of grain transported by it for the plaintiff and has at all times compelled the plaintiff to accept bills of lading on every car of grain shipped over its line, in which is stated that the defendant was not liable for damage or shortage thereto, and refuses to issue to the plaintiff bills of lading on any other condition or terms whatever; and it is further represented that the defendant owes the duty to the plaintiff to receive its shipments of grain in car load lots without exacting from the plaintiff that it will not be responsible for loss or damage in the carrying of the same, and that such exactions are in violation of law, and that as to each of the foregoing matters the plaintiff has no plain, speedy or adequate remedy at law.

Now, therefore, being desirous that justice may be done in the premises, you, The Missouri Pacific Railway Company, the defendant herein, are hereby commanded, that you immediately restore, resume and make transfer of cars, loaded and unloaded, to and from the line of the Atchison, Topeka and Santa Fe Railway Company and to and from its mill and elevators at the station and City of Stafford in the County of Stafford and State of Kansas, upon the request and demand of the plaintiff and upon the payment of the heretofore customary charges therefor, and that you at once and without delay issue upon all shipments of grain by the
9 plaintiff in car load lots from its mill and elevators at said station, without the condition in the bills of lading therefor, that it is not responsible for loss or damage therefor.

Or, if you have any just or valid excuse for not so doing, that you do on or before the 21st day of September 1906, show cause why the writ of peremptory mandamus should not be allowed; and that you then and there return this writ with your answer thereto, that you have done the things herein commanded or therein show cause why you have not done so.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, and the seal of said Court, attested by the Clerk of said Court at the City of Topeka, this 15 day of September 1966.

[SEAL.] D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

On presentation of the affidavit for the writ of mandamus, and on the application of the plaintiff, this alternative writ of mandamus is allowed, this 15 day of September 1906.

W. A. JOHNSTON,
Justice of the Supreme Court of the State of Kansas.

Sheriff's Return.

STATE OF KANSAS, *Shawnee County, ss:*

Received the original writ of which this a true copy, on Sept. 17" 1906, and executed the same by delivering said original writ to F. E. Nipps, personally, on Sept. 18 1906, he being the Station agent for the within named Missouri Pacific Railway Company, at Topeka, Kansas. No other chief officer of said company being found in my County, and said Railway Company not having designated any person upon whom service of process may be had for said Company in this County.

A. T. LUCAS, *Sheriff,*
By G. W. CHARLES, *Deputy.*

Service & Copy	$1.00
Mileage	.20
	$1.20

Endorsed: No. 15,167. In the Supreme Court of the State of Kansas. The Larabee Flour Mills Company, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Alternative writ of mandamus. Copy. Filed Sep. 19 1906 D. A. Valentine Clerk Supreme Court.

10 And afterwards, on the 23rd day of September, 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas the plea in abatement of the defendant to the jurisdiction of the court, which plea in abatement, together with the endorsements thereon is in words and figures as follows, to-wit:—

11 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Plea in Abatement of the Defendant to the Jurisdiction of the Court.

Now comes the above named defendant, The Missouri Pacific Railway Company, and presents this, its plea in abatement to the jurisdiction of the court to hear, try and determine the subject matter of the alternative writ of mandamus issued herein, and thereon alleges and charges the facts to be:

First.

That the said defendant, The Missouri Pacific Railway Company, is a railroad corporation, organized and incorporated under the laws of the state of Missouri, and consolidated with certain corporations

organized and incorporated under the laws of the state of Kansas, and owns and operates lines of railway from the city of St. Louis, in the state of Missouri, to the city of Pueblo, in the state of Colorado, through the states of Missouri, Kansas and Colorado, and from the city of Omaha, in the state of Nebraska, through the state of Nebraska, south through the state of Kansas, into the Indian Territory and Arkansas; that it is an interstate carrier, engaged as aforesaid in the transportation of commerce between the said several states mentioned and the Indian Territory, and has been so engaged in the operation of its railroad as a common carrier for many years last past, and as such is amenable to the Act of the Congress of the United States known as the Interstate Commerce Act, and the amendments thereto, which went into effect on the 28th day of August, 1906.

Second.

That the said plaintiff, The Larabee Flour Mills Company, is a copartnership, as alleged, engaged in owning and operating a mill and elevators, and in the purchase, sale and shipment of grain, flour and feed stuffs in connection therewith, from near the city of Stafford, in the state of Kansas, on one of defendant's aforesaid
12 interstate lines of railroad, to various points in the United States, and engaged in exportation to Liverpool and other foreign points; that the business of said firm is the shipment and transfer of grain, flour, meal and other products from its said location to other points in the United States of America and to foreign points.

Third.

That the Atchison, Topeka & Santa Fe Railway Company named in said writ is a railway corporation, incorporated and organized under the laws of the state of Kansas, operating a line of railway from the city of Chicago, in the state of Illinois, through the state of Kansas, to San Francisco, in the state of California, and from the city of Topeka, in the state of Kansas, to El Paso, in the state of Texas; that it is a common carrier engaged in like and competitive business to and with the said defendant, The Missouri Pacific Railway Company; that the said application of the said plaintiff, The Larabee Flour Mills Company, for a mandamus herein is for the purpose of requiring and compelling this defendant as such common carrier, to give the use of its tracks and terminal facilities to the said Atchison, Topeka & Santa Fe Railway Company, engaged in like business with this defendant, in violation of the requirements and provisions of the Interstate Commerce Act and amendments thereto.

Fourth.

Defendant further says that, under the terms and provisions of the Amended Interstate Commerce Act, as passed by the Congress of the United States, and which took effect on the 28" day of August,

1906, there is vested in the Interstate Commerce Commission full and exclusive power and jurisdiction to hear, try and determine all the matters and things in controversy, mentioned and set forth in the said alternative writ of mandamus.

Wherefore this defendant prays that the said proceeding so instituted by said plaintiff herein may be abated, and that this Court shall hold and determine that it does not have jurisdiction of the subject matter of the controversy, and that said application for a writ of mandamus shall be dismissed, and this defendant required to no further answer or appear therein; and that said defendant have judgment for costs.

FRANK DOSTER,
J. H. RICHARDS,
B. P. WAGGENER,
Attorneys for Defendant.

13 STATE OF KANSAS, *Shawnee County, ss:*

J. H. Richards, being first duly sworn, on oath says, that he is the General Attorney of the defendant, The Missouri Pacific Railway Company, a corporation, for the State of Kansas; that he has read the foregoing plea in abatement and knows that the matters and things therein contained are true.

J. H. RICHARDS.

Subscribed and sworn to before me this 24" day of September, 1906.

D. A. VALENTINE,
[SEAL.] *Clerk Supreme Court.*

Endorsed: No. 15,167. In the Supreme Court of the State of Kansas. The Larabee Flour Mills Co. *v.* The Missouri Pacific Railway Co. Plea in abatement of the defendant to the jurisdiction of the court. Waggener, Doster & Orr, J. H. Richards, For Defendant. Filed Sep. 24 1906 D. A. Valentine Clerk Supreme Court.

14 And afterwards, on the 26th day of September, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas a demurrer of the plaintiff to the plea in abatement of the defendant, which demurrer is in words and figures as follows, to-wit:

15 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Demurrer.

Comes now the above named plaintiff, The Larabee Flour Mills Company and demurs to the plea in abatement of the defendant,

ed herein, for the reason that the said plea in abatement is in-fficient in law to oust this Court of its jurisdiction in this matter to abate this action.

Wherefore, the plaintiff prays that the writ of mandamus may sue as prayed for in the petition of plaintiff, and that the plaintiff ecover its costs herein.

WATERS & WATERS,
Attorneys for Plaintiff.

Endorsed: No. 15167. In the Supreme Court of the State of Kan-s. The Larabee Flour Mills Co., Plaintiff, *vs.* The Missouri Pacific ailway Co., Defendant. Demurrer. Waters & Waters, Attorneys or Plaintiff. Filed Sep. 26 1906 D. A. Valentine Clerk Supreme ourt.

6 And afterwards on the 1st day of October, A. D., 1906, there was filed in the office of the clerk of the Supreme Court f the State of Kansas the motion of the defendant to amend its plea r answer which motion to amend together with the attached inter-ned copy of said plea and draft of an order allowing the same is words and figures as follows, to-wit:—

7 THE LARABEE FLOUR MILLS CO., Plaintiff,
vs.
MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

The defendant asks to be allowed to amend its plea or answer erein as per annexed interlined copy of said plea and draft or order llowing the same.

FRANK DOSTER, *For Def't.*

Endorsed: No. 15,167. Larabee Flour Mills Co., *v.* Mo. Pac. Ry. o. Motion for leave to Amend Answer. Filed Oct. 1 1906 D. A. alentine Clerk Supreme Court.

8 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

lea in Abatement of the Defendant to the Jurisdiction of the Court.

Now comes the above named defendant, The Missouri Pacific Rail-ay Company, and presents this, its plea in abatement to the jurisdic-ion of the court to hear, try and determine the subject matter of he alternative writ of mandamus issued herein, and thereon alleges nd charges the facts to be:

First.

That the said defendant, The Missouri Pacific Railway Company, is a railroad corporation, organized and incorporated under the laws

of the state of Missouri, and consolidated with certain corporations organized and incorporated under the laws of the state of Kansas, and owns and operates lines of railway from the city of St. Louis, in the state of Missouri, to the city of Pueblo, in the state of Colorado, through the states of Missouri, Kansas and Colorado, and from the city of Omaha, in the state of Nebraska, through the state of Nebraska, south through the state of Kansas, into the Indian Territory and Arkansas; that it is an interstate carrier, engaged as aforesaid in the transportation of commerce between the said several states mentioned and the Indian Territory, and has been so engaged in the operation of its railroad as a common carrier for many years last past, and as such is amenable to the Act of the Congress of the United States known as the Interstate Commerce Act, and the amendments thereto, which went into effect on the 28th day of August, 1906.

Second.

That the said plaintiff, The Larabee Flour Mills Company, is a co-partnership, as alleged, engaged in owning and operating a mill and elevators, and in the purchase, sale and shipment of grain, flour and feed stuffs in connection therewith, from near the city
19 of Stafford, in the state of Kansas, on one of defendant's aforesaid interstate lines of railroad, to various points in the United States, and engaged in exportation to Liverpool and other foreign points; that the business of said firm is the shipment and transfer of grain, flour, meal and other products from its said location to other points in the United States of America and to foreign points.

Third.

That the Atchison, Topeka & Santa Fe Railway Company named in said writ is a railway corporation, incorporated and organized under the laws of the state of Kansas, operating a line of railway from the city of Chicago, in the state of Illinois, through the state of Kansas, to San Francisco, in the state of California, and from the city of Topeka, in the state of Kansas, to El Paso, in the state of Texas; that it is a common carrier engaged in like and competitive business to and with the said defendant, The Missouri Pacific Railway Company; that the said application of the said plaintiff, The Larabee Flour Mills Company, for a mandamus herein is for the purpose of requiring and compelling this defendant, as such common carrier, to give the use of its tracks and terminal facilities for the purpose of interstate traffic to the said Atchison, Topeka & Santa Fe Railway Company, engaged in like business with this defendant, in violation of the requirements and provisions of the Interstate Commerce Act and amendments thereto.

Fourth.

Defendant further says that, under the terms and provisions of the Amended Interstate Commerce Act, as passed by the Congress

the United States, and which took effect on the 28" day of August, 06, there is vested in the Interstate Commerce Commission full d exclusive power and jurisdiction to hear, try and determine the matters and things in controversy, mentioned and set forth the said alternative writ of mandamus.

Wherefore this defendant prays that the said proceeding so instituted by said plaintiff herein may be abated, and that this Court shall hold and determine that it does not have jurisdiction of the subject matter of the controversy, and that d application for a writ of mandamus shall be dismissed, and this fendant required to no further answer or appear therein; and t said defendant have judgment for costs.

——— ———,
——— ———,
Attorneys for Defendant.

ATE OF KANSAS, *Shawnee County, ss:*

J. H. Richards, being first duly sworn, on oath says, that he is e General Attorney of the defendant, The Missouri Pacific Railay Company, a corporation, for the State of Kansas; that he has d the foregoing plea in abatement and knows that the matters d things therein contained are true.

——— ———.

Subscribed and sworn to before me this — day of September, 1906.

——— ———,
Notary Public.

My Commission Expires ———.

Endorsed: No. —. Supreme Court of Kansas. The Larabee our Mills Co. *vs.* Mo. Pac. Ry. Co. Plea in abatement of the dendant to jurisdiction of court. Waggener, Doster & Orr, J. H. chards, For Defendant.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

On application of defendant and before submission of the deurrer to its plea in abatement it is ordered that said defendant have ve to amend its said plea by interlinings in the third paragraph ereof, and after the words "terminal facilities" the words "for the rpose of interstate traffic."

Endorsed: Larabee Flour Mills Company *vs.* Mo. Pac. Ry. Co. der for Leave.

Be it further remembered, that on the first day of October, A. D., 1906, the same being one of the regular judicial days the July 1906 term of the Supreme Court of the State of Kansas,

said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record as follows, to-wit:

23 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS CO., Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

This cause comes on to be heard on the demurrer of the plaintiff to the plea in abatement of the defendant heretofore filed herein; and thereupon after oral argument by J. C. Waters for the plaintiff and by Frank Doster for the defendant, said demurrer is *submitted* on brief of counsel for the plaintiff and taken under advisement by the court.

24 Be it further remembered that afterwards on the 6th day of October A. D., 1906, the same being one of the regular judicial days of the July 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:

25 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes on for decision the motion of the defendant to amend its answer, and the demurrer of plaintiff to defendant's plea: and thereupon it is ordered that said motion to amend be *denied*. It is further ordered that the demurrer of the plaintiff to the plea in abatement of the defendant be sustained, and that the defendant be given to October 10th within which to plead or answer to the petition of the plaintiff.

26 And afterwards on the 10th day of October, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, the answer and return of the defendant to the alternative writ of mandamus which answer and return is in the words and figures as follows, to-wit:—

In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILLS COMPANY, a Partnership, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Answer and Return to Alternative Writ of Mandamus.

The alternative writ of mandamus heretofore on the 15th day of ptember 1906, by the Honorable W. A. Johnston, Chief Justice the Supreme Court of the State of Kansas, issued and allowed in e above entitled cause and directed to the above named defendant, e Missouri Pacific Railway Company, having been delivered to d defendant on the 18th day of September 1906, requiring said fendant, as commanded in said writ, to make return of the same o court with its answer and return thereto attached on or before 21st day of September 1906 showing cause why the writ of remptory mandamus should not be allowed, said defendant for answer and return to said writ says:

I.

That except as hereinafter admitted it denies each and every aver- nt in the affidavit of said plaintiff and the writ of said court con- ned.

II.

For further answer and return to said writ it says that it admits co-partnership composed of F. D. and F. S. Larabee, and that y have been engaged in operating a mill, warehouse and elevators, l in the purchase, sale and shipment of grain, flour and feed ffs in connection therewith for several years last past at the city Stafford in the County of Stafford and state of Kansas; that said ll and elevators have the capacity stated; that they have been gaged in the operation of said mill, the manufacture of flour and its sale and shipment to any place, country or customer purchasing same whether in the United States or any foreign countries, l has been engaged in the purchase, sale, storage and shipment grain in connection with said business to all such points and places l that said business has a maximum capacity of approximately one and one-half millions of dollars per annum.

This defendant further admits that it is a corporation and that there is an intersection of its line with the lines of The chison, Topeka & Santa Fe Railway Company at Stafford; that said The Santa Fe Railway Company several years ago built ide track from its own line to a connection with the track of said fendant at said place, which track was the only track at that point on which cars could be transferred from the Santa Fe to the ssouri Pacific main tracks and sidings; that said mill and elevators located near its line of road and cars loaded and unloaded have en transferred over said transfer track to said mill and elevators r this defendant's main line and side tracks. And that the said

The Atchison, Topeka & Santa Fe Railway Company constructed said side track, as stated in said affidavit and writ, for the sole purpose of transferring its cars over the terminals of the defendant company and thence onto plaintiff's side track; and admits that such use of this defendant's lines has been of great convenience and profit to said plaintiff and to said Santa Fe Railway Company, but charges and alleges the fact to be that such service so rendered by this defendant is and has been during all said time correspondingly and grievously burdensome and expensive to this defendant, and wholly without adequate compensation.

III.

For its further defense this defendant alleges and shows that this defendant, The Missouri Pacific Railway Company, is a railroad corporation organized and incorporated under the laws of the state of Missouri and consolidated with certain corporations organized and incorporated under the laws of the state of Kansas, and owns and operates lines of railway from the city of St. Louis in the state of Missouri to the city of Pueblo in the state of Colorado, through the states of Missouri, Kansas and Colorado, and from the city of Omaha in the state of Nebraska through the state of Nebraska south through the state of Kansas into the Indian Territory and Arkansas; that it is an interstate carrier engaged, as aforesaid, in the transportation of commerce between the said several states mentioned and the Indian Territory, and has been so engaged in the operation of its railroad as a common carrier for many years last past, and as such is amenable, wholly, to the act of Congress of the United States
29 known as the "Interstate Commerce Act," and the amendments thereto, which went into effect on the 28th day of August 1906.

That the said plaintiff, The Larabee Flour Mills Company, is a co-partnership, as alleged, engaged in owning and operating a mill and elevators and in the purchase, sale and shipment of grain, flour and feed stuffs in connection therewith from near the city of Stafford, in the state of Kansas, on one of defendant's aforesaid interstate lines of railroad, to various points in the United States, and engaged in exportation to Liverpool and other foreign points; that the business of said firm is the shipment and transfer of grain, flour, meal and other products from its said location to other points in the United States of America and to foreign points, over said transfer line to the line or lines of the said The Atchison, Topeka & Santa Fe Ry. Co., as herein set forth.

IV.

That the Atchison, Topeka & Santa Fe Railway Company, named in said writ, is a railway corporation, incorporated and organized under the laws of the state of Kansas, operating a line of railway from the city of Chicago, in the state of Illinois, through the state of Kansas, to San Francisco, in the state of California, and from the city of Topeka, in the state of Kansas, to El Paso, in the state of Texas; that it is a common carrier engaged in like and competitive

business to, and with, the said defendant, The Missouri Pacific Railway Company; that the said The Missouri Pacific Railway Company, and the said The Atchison, Topeka & Santa Fe Railway Company, are engaged in interstate traffic and transportation, and as such serve the said The Larabee Flour Mills Company in the manner herein described; that the application of The Larabee Flour Mills Company for the mandamus herein is for the purpose of compelling this defendant as such common carrier to give the use of its main tracks, side tracks and terminal facilities, for purposes wholly of interstate shipments to it and to the said, The Atchison, Topeka & Santa Fe Railway Company, so engaged in like business with this defendant, and being in violation of the requirements and provisions of the Interstate Commerce Act and amendments thereto, and in violation of the Constitution of the United States, and especially the fourteenth amendment thereto, prohibiting the taking of property without due process of law, and the unequal protection of the laws.

V.

This defendant further says that under the terms and provisions of the amended Interstate Commerce Act as passed by the Congress of the United States, and which took effect on the 28th day of August 1906, there is vested in the Interstate Commerce Commission full and exclusive power and jurisdiction to hear, try and determine, all the matters and things in controversy mentioned and set forth in the said alternative writ of mandamus, and that neither the state of Kansas, nor any court or commission of said state, has the right, power, authority or jurisdiction to hear and determine any question or controversy arising under the pleadings and issues of this case.

VI.

This defendant for a further defense and return herein alleges and charges the fact to be that, said plaintiff, The Larabee Flour Mills Company, in the prosecution of its business as hereinbefore described, has persistently, and on frequent occasions during the past year or more, demanded that this defendant should set on its sidings for said Mills Company at the said city of Stafford, and convenient for its use in said business, cars so received from said transfer track, and over the main lines of defendant company, in excess of the number reasonably required to serve said Mills Company's business, to the exclusion of the necessities and discharge of the duties of this defendant in supplying cars to the general public, and consequently to its great loss and injury, and to the deprivation, loss and injury of other shippers having equal or paramount claims thereto, and in violation of the Interstate Commerce Act aforesaid, prohibiting discrimination, undue preference and prejudice.

That when, in order to prevent such abuse, this defendant on the 29th day of August, 1906, being the time complained of, and also before and since that time, as it might lawfully do, put into force and operation the assessment of lawful demurrage, said plaintiff thereupon positively refused to pay such lawful demurrage or any

part thereof, or any demurrage whatever, and repeatedly de-
31 nied the right of this defendant to insist upon either the levy or the collection of the same, or the validity of the law, or the rules and regulations of the Car Service Association, under and pursuant to which such levy and assessment were so made, and then notified this defendant that henceforth it, the said Larabee Flour Mills Company, would neither pay any demurrage for such wrongful detention of said cars, nor recognize the validity of any demurrage law, rule or regulation, and that it refused to pay this defendant the sum and amount of five hundred ($500) dollars which it then owed this defendant therefor; and refused to recognize the right or authority of said Car Service Association, a lawful body and organization having authority of law, and recognized by the courts of the country as so being, and so having authority to intercede in the interest of the public service in such cases, to exercise any authority or enforce in behalf of the public, or of this defendant, any rule, regulation or order whatever.

Wherefore, this defendant still prays that this court shall hold and determine that it does not have jurisdiction of the subject of this controversy, or power or right to hear and determine the same, or to give the relief asked for by said plaintiff, that said application for writ of mandamus shall be dismissed and that said defendant have judgment for costs.

J. H. RICHARDS &
WAGGENER, DOSTER & ORR,
Attorneys for Defendant.

Endorsed: No. 15,167. The Larabee Flour Mills Co., a partnership, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Answer and return to alternative writ of mandamus. Filed Oct. 10 1906 D. A. Valentine Clerk Supreme Court.

32 Be it further remembered that afterwards, on the 13th day of October, A. D., 1906, the same being one of the regular judicial days of the July 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:—

33 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now come counsel for both parties and present their application for the appointment of a commissioner to take testimony and make findings of fact therefrom in this proceeding; and thereupon it is

ordered that said application be *allowed* and that H. C. Sluss, of Sedgwick County, be appointed a commissioner to take the testimony offered herein by both parties and make findings of fact therefrom; and that he take and subscribe to an oath of office; and that he have and is hereby empowered as such commissioner to summon witnesses, administer oaths, compel attendance and compliance with all proper orders in connection with the taking of said testimony. It is further ordered that the plaintiff shall begin to take its testimony before said commissioner on November 1st. and that the defendant begin to take its testimony by November 5th.; that the hearing of this proceeding be had on November 9th. 1906. It is further ordered that the litigants hereto provide proper compensation for the commissioner together with his expenses in advance; the judgment to be rendered herein to determine finally the liability of the parties therefor.

34 And afterwards on the 10th day of November, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas the report of Henry C. Sluss, the Commissioner appointed herein to take evidence and make findings of fact therefrom, which report, and the findings of fact by the Commissioner made therefrom, together with the amendment to the fourth paragraph of the findings of fact presented and filed on November 15th, A. D., 1906, is in words and figures as follows, to-wit:—

35 In the Supreme Court of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Findings of Fact.

Henry C. Sluss Commissioner appointed by the order of the Court in this cause to take the testimony and report findings of fact, comes and submits that having taken all the testimony desired by either party, and having fully considered the same, *have* made findings of fact upon said testimony as follows.

First.

In the succeeding findings The Missouri Pacific Railway Company will be referred to as "The Missouri Pacific;" the Atchison Topeka and Santa Fe Railway Company as "The Santa Fe;" The Missouri Valley Car Service and Storage Association as "The Car Service Association;" and the Plaintiff as "The Mill Company."

Second.

Stafford is a flourishing town of 1600 people in Stafford County, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe each

have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereon.

The Mill Company has, and for more than four years has had, a flouring Mill of one thousand barrels daily capacity, and continuously operates this mill except on Sundays. This mill is located alongside the tracks of the Missouri Pacific and a short distance from its freight station. The tracks and freight stations of the two roads are separate a distance of one mile, and the Santa Fe station and station facilities are one mile from the mill. The Mill Company ships from its mill over these two roads substantially its entire product, three fifths of which is so shipped out of the State of Kansas and into other states, and two fifths to points within the state of Kansas. The Mill Company purchases a large portion of its
36 grain at Stafford, which is delivered in wagons at the Mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in car load lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its products to dealers, and the larger portion of its output is shipped to customers most conveniently reached by shipping from Stafford by the Santa Fe, and a large portion is shipped to customers most conveniently reached by shipping from Stafford by the Missouri Pacific.

Third.

The Missouri Valley Car Service and Storage Association, is an unincorporated voluntary association of a number of railroad companies, having a manager and other employés. The object and the duty of this Association is to represent, serve, protect the interest, and enforce the rights of the members thereof in the matter of the interchange of freight cars, the prompt loading, unloading, and return of cars interchanged, or delivered to shippers, for traffic purposes.

This Association has been in operation for many years, and from a time prior to any of the transactions mentioned in this investigation; and its objects and operations and methods have been generally understood by commercial shippers by car load lots, and generally acquiesced in as a proper instrument for securing to the shipping public the greatest amount of service from the available car supply of the roads composing it. The Association has adopted and had in effect since January 1, 1904, a body of rules, a printed copy of which accompanies these findings.

Fourth.

(See Amended finding attached.)

37 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Comes now H. C. Sluss, Commissioner heretofore appointed to take the testimony and report findings of fact in this case and asks leave to amend the fourth paragraph of the report of his findings heretofore made to the court so that the said paragraph shall read as follows.

Fourth.

The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distant westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection the Santa Fe in the year 1903 constructed at its own expense a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line is located in Prairie Avenue, a public street of Stafford; and no part of the transfer track is owned by the Missouri Pacific, or on its right of way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of way both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right of way over which it passes.

H. C. SLUSS, *Commissioner.*

Endorsed: 15,167. Larabee Flour Mill Co. *v.* Mo. Pac. Ry. Co. Amendment to Section 4 of Comm'r's report on evidence. Filed Nov. 15 1906 D. A. Valentine Clerk Supreme Court.

38 Fifth.

Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars to be by the Missouri Pacific taken therefrom and placed for loading with flour at the Mill Company's Mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with

flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was; when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would place them at the mill and when the cars were loaded, return them to the transfer track charge the Santa Fe two dollars per car for the service, notifying it of the switching: The Santa Fe would take the cars, bill them to destination, collect all freight and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue Bill of Lading, way bill, or receipt, or present or collect bills for freight or switching charges.

Sixth.

When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

Seventh.

In making its applications to the Santa Fe for cars, in no
39 instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for, furnishing, transferring or returning cars as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state and cars intended to carry to points within the state of Kansas.

Eighth.

The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company.

Ninth.

I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in

car load lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

Tenth.

From December 12, 1905, to April 26, 1906, fifty two cars taken empty from the transfer track by the Missouri Pacific and placed at or near the mill for loading, were detained after the expiration of forty eight hours from 7 A. M. of the day following their placing, before they were loaded by the Mill Company and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car eighty six days. The agent of the Missouri Pacific acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessments amounted to a total charge of Eighty six dollars.

From July 24 to August 14, 1905, twenty nine cars loaded with wheat taken by the Missouri Pacific from the transfer track and placed at or near the mill to be unloaded and reloaded with flour, were detained after the expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car one hundred and four days.

The agent of the Missouri Pacific acting as above, added to the free time to be allowed these cars to the extent of twenty six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26 when there were five cars, and on July 27 when there were six cars, and on July 30 when there were fifteen cars requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amount in the aggregate to Seventy eight dollars.

Eleventh.

After the car service charges on the loaded cars had been assessed, the Agent of the Missouri Pacific under instructions from the Car Service Association demanded of the Mill Company the payment of the whole of the car service charges assessed, both the eighty six dollars on account of empty and the seventy eight dollars on account of loaded cars. Thereupon the Mill Company offered to pay the eighty six dollars on account of the empty cars, and refused to pay seventy eight dollars on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading.

The Agent of the Missouri Pacific under the instruction of the Car Service Association refused to accept the eighty six dollars or any

sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts with the understanding
41 that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

Twelfth.

On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for cars service charges, the Missouri Pacific by the direction of the Car Service Association ceased and refused to make further delivery to the Mill Company of empty cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in, the refusal to make such further delivery of such empty cars to the Mill Company is to compel it to pay the whole of both amounts of car service charges under the understanding described in paragraph eleven by the enforcement of the rules of the Car Service Association. The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

Thirteenth.

As a result of the refusal to make delivery of empty cars as described in paragraph twelve, the Mill Company when desiring to ship any of its products from Stafford by the Santa Fe is compelled to haul the same in wagons from its mill to the station of the Santa Fe and load into cars from wagons. This entails upon the Mill Company great inconvenience and great additional expense in the management of its business.

Fourteenth.

During the period covered by the car service charges on loaded cars constituting the seventy eight dollars so demanded, an unusual and heavy demand was being made upon the Missouri Pacific
42 for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned in Kansas. The freight service on that portion of its line was performed throughout the year by a single engine and train crew, passing from Conway to Larned and return. The transfer and switching service performed by the Missouri Pacific hereinbefore described, was performed by this single engine and crew. Ordinarily and by the train schedule, this engine and crew passed through Stafford and performed such transfer and switching service once in the early part and once in the latter part of each day except Sunday: and when so performed with reasonable

ıptness and regularity, this single engine and crew were capable erforming the service to the satisfaction of the Mill Company. engine so used was old and frequently defective and out of r. The single engine and crew were not sufficient or equal to the unusual demand of the business of that part of the line ng the period mentioned, and perform the transfer and switch- service in question with promptness or regularity.

uring the period mentioned the Mill Company made its ap- tions from time to time to the Santa Fe for such number of in addition to the loaded cars consigned to it which it might nable anticipate would arrive at the same time, as it deemed ssary in its business, but not for a greater number of cars to be ered at one time than, together with such loaded cars, it could within the free time allowed if such empty and loaded cars properly placed with reasonable promptness.

Fifteenth.

he crowded condition of the business on the Missouri Pacific ng that period and the general character of its motive power and crew were well known to its agent, as well also to the Santa and to the Mill Company.

hen the Mill Company placed its applications for cars with the a Fe, it could not certainly know the day on which they would laced on the transfer track; or know with certainty on what day ed cars consigned to it over the Santa Fe would arrive and be placed on the transfer track; or know that at such times such cars could not be properly placed by the Missouri Pacific with reasonable promptness, and removed when reloaded with like ıptness. The Missouri Pacific did not better or increase its ive power or train service to meet the increased and unusual and of its business during the period mentioned.

Sixteenth.

find as a fact that the detention of the loaded cars beyond the time allowed, on account of which the disputed car service to amount of seventy-eight dollars was assessed against the Mill ıpany, was caused as much by the fault and defective motive er and insufficient train service of the Missouri Pacific, as from fault or omission on the part of the Mill Company.

Seventeenth.

he plaintiff has introduced testimony tending to show the unt of expenses incurred in and about this suit, and amount of nable compensation for attorneys' services in conducting it. make no findings upon these questions, for the reason that it not appear that they are included in the order of reference, therefore not within my province to determine.

return herewith the transcript of the evidence taken, and the bits introduced.

H. C. SLUSS, *Commissioner.*

ovember 8" 1906.

Endorsed: No. 15,167. The Larabee Flour Mills Co., Plaintiff, *vs.* The Missouri Pacific Rly. Co. Defendant. Report and Findings of Fact of The Commissioner. Filed Nov. 10 1906 D. A. Valentine Clerk Supreme Court.

44 No. 15167. Duplicate.

Missouri Valley Car Service Association.

Rules and Instructions to Agents.

Effective January 1, 1904.

Cancels previous Rules and Instructions of Missouri Valley, Missouri and Kansas and Kansas City Car Service Associations.

309 Kansas City Life Bldg., Kansas City, Mo.

45 *Members of the Missouri Valley Car Service Association.*

Atchison, Topeka & Santa Fe Railway Co.
Burlington & Missouri River R. R. in Nebraska.
Carrollton Electric Railway Co.
Chicago & Alton Railway Co.
Chicago, Burlington & Kansas City Railway Co.
Chicago Great Western Railway Co.
Chicago, Burlington & Quincy Railway Co.
Chicago, Milwaukee & St. Paul Railway Co.
Chicago, Rock Island & Pacific Railway Co.
Choctaw, Oklahoma & Gulf Railroad Co.
Denver, Enid & Gulf Railroad Co.
Gulf, Colorado & Santa Fe Railway Co.
Hannibal & St. Joseph Railroad Co.
Kansas City Belt Railway Co.
Kansas City, Clinton & Springfield Railway Co.
Kansas City Northwestern Railroad Co.
Kansas City Southern Railway Co.
Kansas City, St. Joseph & Council Bluffs R. R. Co.
Kansas Southwestern Railway Co.
Keokuk & Western Railroad Co.
Leavenworth, Kansas & Western Railway Co.
Leavenworth & Topeka Railway Co.
Missouri, Kansas & Texas Railway Co.
Missouri Pacific Railway Co.
Quincy, Omaha & Kansas City Railway Co.
St. Joseph & Grand Island Railway Co.
St. Joseph Terminal Railroad Co.
St. Louis, Iron Mountain & Southern Railway Co.
St. Louis & San Francisco Railroad Co.
Union Pacific Railroad Co.
Wabash Railroad Co.

6 *Special Instructions to Agents at Junction Points.*

Under Rule IV., Section I, consignees will be expected to file ith Agent, standing or advance orders so as to facilitate the move- nent of cars after arrival, and avoid delay for disposition. In the bsence of such orders, Agents will consider cars as placed at first A. M. after arrival. If cars are subsequently ordered to connecting ine for switch delivery, Agent of initial line will assess car service rom first 7 A. M. after arrival until ordered, with no allowance of ree time. Regular unloading time will be allowed after placing on onnecting line.

B. H. GARRIGUES, *Manager.*

7 *Missouri Valley Car Service Association Rules.*

RULE I.

SECTION 1. All cars held by shippers or consignees for the load- ng or unloading of freight, except live stock, are subject to car ervice rules.

SEC. 2. In calculating time, Sundays and the following holidays re excepted: January 1st, February 22d, May 30th, July 4th, Labor Day, Thanksgiving Day, December 25th, National, State and in ities of the first and second class, City election days.

RULE II.

Time Allowed for Loading or Unloading.

SECTION 1. Forty-eight hours free time from 7 a. m. following placing of car will be allowed for the loading or unloading of all commodities, except that 72 hours free time will be allowed for the *unloading* of bituminous coal, coke, bulk lime, and ore for smelting.

SEC. 2. Free time on freight in bond will commence upon re- lease by United States Customs Inspector, except that not more than 24 hours following 7 a. m. after arrival will be allowed for such release.

RULE III.

Charges.

SECTION 1. After the expiration of the free time allowed a charge of $1.00 per car for each 24 hours or fraction thereof shall be made and collected for detention of all cars held for loading or 48 unloading or subject to orders of shippers, consignees or their agents.

SEC. 2. Private cars, when held on tracks of their owners only, are exempt from car service charges.

RULE IV.

SECTION 1. In cities where there is established State Grain Inspection, 24 hours free time will be allowed for inspection and reconsigning or changing the consignee of cars of grain and hay, except that in Kansas City and St. Joseph 48 hours free time will be allowed for such inspection and reconsigning. Other than this no allowance of free time will be made for changing consignee or reconsigning cars loaded with any commodity to tracks within the switching limits of the point from which reconsigned.

SEC. 2. When cars are reconsigned to other stations at a further charge to consignee or consignor, 24 hours free time from first 7 a. m. after arrival at point of reconsignment, will be allowed (except as noted in Sec. 1).

RULE V.

Inability to Receive Freight.

In case any road cannot receive freight from other lines it shall promptly notify such lines of its inability to receive so that they may make other disposition of shipments, and cars so held will be subject to car service charges.

49

RULE VI.

Deliveries.

SECTION 1. Cars containing freight to be delivered on team tracks or private tracks on initial or connecting line must be placed or delivered immediately upon arrival or as soon thereafter as possible.

SEC. 2. The delivery of cars consigned or ordered to private tracks shall be considered to have been effected either when cars have been placed upon the tracks designated, or if such tracks be full, when the road offering would have made delivery had the condition of such tracks permitted.

SEC. 3. When cars are moved without charge from one delivery track to another for accommodation of consignee, time should be counted from the original placing.

RULE VII.

Cars placed for unloading will not be subject to order for loading from the owners of the property contained therein, or any other shipper, until same are empty.

RULE VIII.

Agents will assess and collect car service charges regardless of the state of the weather.

Rule IX.

Collection of Car Service.

ECTION 1. On all public deliveries car service must be collected he agent DAILY as it accrues. When consignees or consignors refuse to pay, the agent must hold the car until payment is made, the regular charges being assessed until car is unloaded; or at his option he may send car to public storage se or yard where the freight will be held subject to regular ige charges in addition to the accrued car service and all other ges.

EC. 2. On deliveries to private sidings, should consignees or conors refuse to pay or unnecessarily defer settlement of bills for service, the agent will decline to switch cars to the private sidings uch parties, notifying them that deliveries will only be made to n on the public delivery tracks of the company, after the payt of freight charges at his office. Agent will promptly notify nager of action taken.

Rule X.

Claims.

ECTION 1. The Manager is authorized to entertain claims and nd car service charges in special cases. Claims should be made et to the Manager, with paid car service bills attached, and each m should carry with it a full statement of the grounds upon ch reduction of the car service is requested.

EC. 2. Claims based on weather will be allowed only when the ement weather occurs during the free time and when the comdity is one which is liable to be damaged. When good weather ails during the free time, no allowance will be made for stormy ther thereafter.

Rule XI.

Each railroad member of this association will be responsible for service accruing on account of errors of its employees and will line to refund car service resulting from errors of employees of necting lines.

Rule XII.

All complaints arising from nonconformity to the rules of this ociation, or any neglect in enforcing same, and all cases involv uncertainty as to the proper meaning or application of these es should be referred to the Manager for decision.

By order of the Association.

B. H. GARRIGUES, *Manager.*

52 Be it further remembered that afterwards, on the 9th day of November, A. D., 1906, the same being one of the regular judicial days of the July 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:—

53 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS CO., Plaintiff,
vs.
THE MO. PAC. R'L'Y CO., Defendant.

Journal Entry of Continuance.

On application of counsel it is *ordered* that the brief of the plaintiff herein be served and filed within three (3) days from this date, and that the brief of the defendant be served and filed on or before the day of hearing.

It is further *ordered* that the hearing of this cause be assigned for the 19th day of November, 1906.

54 And afterwards on the 12th day of November, A. D., 1906, there was filed in the office of the clerk of the supreme court of the State of Kansas a withdrawal of the application for mandamus to compel the defendant to issue bills of lading, and also an application by the plaintiff for an award of its costs, damages and expenses, which application, together with the endorsements thereon are in words and figures as follows, to-wit:—

55 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Withdrawal of Application for Mandamus to Compel the Defendant to Issue Certain Bills of Lading.

The plaintiff, respectfully withdraws from the consideration of the Court, that part of its application for the writ of mandamus to compel the defendant to issue certain bills of lading, leaving as the one issue to be tried, the resumption of switching service by the defendant over the transfer track for the plaintiff.

WATERS & WATERS,
Attorneys for Plaintiff.

Endorsed: No. 15,167. In the Supreme Court of the State of ansas. The Larabee Flour Mills Co., Plaintiff, *vs.* The Missouri acific Railway Co., Defendant. Withdrawal of application for andamus to compel the defendant to issue certain bills of lading. aters & Waters, Attorneys for Plaintiff. Filed Nov. 12 1906 D. A. alentine Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

pplication of Plaintiff to be Awarded its Costs, Damages, and Expenses.

The plaintiff alleges that it has been necessarily put to and sus-ined a large amount of costs, damages, expenses and attorneys fees, reason of the refusal of defendant to perform its duty of trans-rring cars for the plaintiff and it respectfully applies to this Court at the same may by the Court, a jury or by referee, as this Court all deem proper, be ascertained and that it may be given judgment erefor, and execution awarded it.

WATERS & WATERS,
Attorneys for Plaintiff.

Endorsed: No. 15167. In the Supreme Court of the State of Kan-s. The Larabee Flour Mills Co., Plaintiff, *vs.* The Missouri Pacific ailway Co., Defendant. Application of plaintiff to be awarded its sts, damages and expenses. Waters & Waters, Attorneys for Plain-ff. Filed Nov. 12 1906. D. A. Valentine Clerk Supreme Court.

Be it further remembered that afterwards, on the 20th day of November, A. D., 1906, the same being one of the regular dicial days of the July, A. D., 1906 term of the supreme court of e state of Kansas, said court being in session at its court room in e city of Topeka, the following proceeding was had and remains record in words and figures as follows, to-wit:—

In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

This cause came on to be heard on the pleadings filed herein and on the testimony taken before, and the findings of fact made by,

the commissioner heretofore appointed herein: Thereupon after oral argument by J. G. Waters for the plaintiff and by B. P. Waggener and Frank Doster for the defendant, said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court. It is further ordered that the defendant may file additional brief on or before the 26th of November, 1906.

59 Be it further remembered that afterwards on the 8th day of December A. D., 1906, the same being one of the regular days of the July, A. D., 1906 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record as follows, to-wit:—

60 In the Supreme Court of the State of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS CO., Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

Journal Entry of Judgment.

This cause comes on for decision and thereupon it is ordered and adjudged that the Peremptory Writ of Mandamus prayed for by the plaintiff be *allowed*, and that judgment herein be entered against the defendant, and that the Peremptory Writ of Mandamus be issued to the defendant, commanding it to immediately restore, resume and make transfer of cars loaded and unloaded from the line of the A. T. & S. F. Rly. Co. and to and from its mill and elevator at the station and city of Stafford in the county of Stafford and State of Kansas upon the request and demand of the plaintiff and upon the payment of the heretofore customary charges therefor. And further commanding it to at once and without delay issue upon all shipments of grain by the plaintiff, Larabee Flour Mills Co. in car load lots from its mill and elevator at said station, without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor.

It is further ordered that the defendant pay the costs of this proceeding taxed at $—, and hereof let execution issue.

It is further ordered that plaintiff be allowed ten days from this date within which to file a claim for damages, and the defendant is allowed after notice of the filing of the claim, ten days within which to except to any items which it may deem not recoverable.

61 On the same day, to-wit, the 8th day of December, A. D., 1906, there was filed in the office of the clerk of the supreme court of the State of Kansas the court's syllabus and opinion, which syllabus and opinion are in the words and figures as follows, to-wit:

62

No. 15167.

THE LARABEE FLOUR MILLS COMPANY
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Original Proceeding in Mandamus.

Writ Allowed.

Syllabus by the Court, Burch, J.

1. Under the facts of this case it is held that a railway company, holding itself out to the public as ready, and as undertaking, to do switching which requires it to have its own rails and right of way, and go upon the rails and right of way of another company with which it has no express contract relating either to compensation for switching or to track rights, is a common carrier and as such must switch cars without discrimination against a disfavored shipper.
2. If the switching service described be wrongfully discontinued as to a single shipper he is entitled to a writ of mandamus to compel the carrier to resume it.
3. A common carrier of the kind described has no right to discontinue switching cars for a shipper on account of his refusal to pay bills for car service when the detention for which the charges were assessed was occasioned as much by the fault of the carrier as by the fault of the shipper.
4. A rule or order obliging a shipper to pay car service charges whether just or unjust, with no redress but to submit a claim for the return of his money to the manager of the car service association promulgating the requirement, is not reasonable.
5. The internal movement of property is not freed from state control until after it has been finally released by the consignor
63 to a carrier for transportation to a destination fixed beyond the state line; and under the facts of this case such control is not lost until after the freight has been billed to its destination.
6. The switching of cars, loaded with freight afterwards transported to another state, which is purely local, which is independently contracted for, which has no relation to the contract of carriage under which the freight is removed beyond the border of the state, which has no relation to the ultimate destination of the cars, and which begins and ends before the destination of any car handled is fixed, is a mere preliminary incident to interstate commerce and subject to state control.
7. Under the facts of this case it is held that the writ of mandamus may issue notwithstanding the remedy afforded by proceeding before the board of railroad commissioners.

All the Justices concurring.
A true copy.
Attest:

____ ____,
Clerk Supreme Court.

64 No. 15167.

THE LARABEE FLOUR MILLS COMPANY
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Original Proceeding in Mandamus.

Writ Allowed.

The opinion of the court was delivered by BURCH, *J.*:

The plaintiff asks that a writ of mandamus be issued to compel the defendant to perform certain of its duties as a common carrier. The facts as found by a commissioner appointed to take the testimony and report findings of fact are as follows:

"First.

"In the succeeding findings The Missouri Pacific Railway Company will be referred to as 'The Missouri Pacific:' the Atchison, Topeka and Santa Fe Railway Company as 'The Santa Fe:' The Missouri Valley Car Service and Storage Association as 'The Car Service Association;' and the Plaintiff as 'The Mill Company.'

"Second.

"Stafford is a flourishing town of 1600 people in Stafford County, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe each have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereat.

"The Mill Company has, and for more than four years has had, a flouring Mill of one thousand barrels daily capacity, and continuously operates this mill except on Sundays. This mill is located along side the tracks of the Missouri Pacific and a short distance from its freight station. The tracks and freight stations of the two roads are separate a distance of one mile, and the Santa Fe station and station facilities are one mile from the mill. The Mill Company ships from its mill over these two roads substantially its entire product, three fifths of which is so shipped out of the state of Kansas and into other states, and two fifths to points within the state of Kansas. The Mill Company purchases a large por-
65 tion of its grain at Stafford, which is delivered in wagons at the mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in carload lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its product to dealers, and the larger portion of its output is shipped to customers most conveniently reached by shipping from Stafford by the Santa Fe,

ıd a large portion is shipped to customers most conveniently ached by shipping from Stafford by the Missouri Pacific.

"Third.

"The Missouri Valley Car Service and Storage Association, is an nincorporated voluntary association of a number of railroad comanies, having a manager and other employees. The object and the ıty of this Association is to represent, serve, protect the interest, ıd enforce the rights of the members thereof in the matter of the ıterchange of freight cars, the prompt loading, unloading, and 'turn of cars interchanged, or delivered to shippers, for traffic purɔses.

"This Association has been in operation for many years, and from time prior to any of the transactions mentioned in this investiıtion, and its objects and operations and methods have been genɔally understood by commercial shippers by car load lots, and genɔally acquiesced in as a proper instrument for securing to the shiping public the greatest amount of service from the available car ıpply of the roads composing it. The Association has adopted ıd had in effect since January 1, 1904, a body of rules, a printed ɔpy of which accompanies these findings.

"Fourth.

"The lines of the Missouri Pacific and the Santa Fe intersect at a ɔint one mile distance westwardly from the mill and the Missouri 'acific station, and the same distance from the Santa Fe station. As ear as practicable to the intersection the Santa Fe in the year 1903 ɔnstructed at its own expense a transfer track from a connection ith its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line 6 is located in Prairie Avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, r on its right of way or private ground. No express contract is ıown to exist between the two railroad companies requiring either ɔ use, or to permit the other to use the transfer track, or reıiring either to place empty or loaded cars thereon to be taken way or returned by the other. In order for the Missouri Pacific ɔ take cars from the said transfer track which had been placed ıereon by the Santa Fe, or return such cars thereto, it is necessary ɔr it to go entirely off its own track and right of way both in going fter cars standing on said Santa Fe transfer track, and in setting ɔaded cars on the same; the Missouri Pacific not owning and having ɔ control over any part of the said track or of the right of way ver which it passes.

"Fifth.

"Immediately after the construction of the transfer track the anta Fe began to place thereon empty cars to be by the Missouri 'acific taken therefrom and placed for loading with flour at the

Mill Company's Mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; The Santa Fe would take the cars, bill them to destination, collect all freight and pay the
67 Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue Bill of Lading, way bill, or receipt, or present or collect bills for freight or switching charges.

"Sixth.

"When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

"Seventh.

"In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning cars as hereinbefore outlined in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state, and cars intended to carry to points within the state of Kansas.

"Eighth.

"The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company.

"Ninth.

"I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri

Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in car load lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

68

"Tenth.

"From December 12, 1905, to April 26, 1906, fifty two cars taken empty from the transfer track by the Missouri Pacific and placed at or near the mill for loading, were detained after the expiration of forty eight hours from 7 A. M. of the day following their placing, before they were loaded by the Mill Company and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car eighty six days. The agent of the Missouri Pacific acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessment amounted to a total charge of Eighty six dollars.

"From July 24 to August 14, 1906, twenty nine cars loaded with wheat taken by the Missouri Pacific from the transfer track and placed at or near the mill to be unloaded and reloaded with flour, were detained after the expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car one hundred and four days.

"The agent of the Missouri Pacific acting as above, added to the free time to be allowed these cars to the extent of twenty six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26 when there were five cars, and on July 27 when there were six cars and on July 30 when there were fifteen cars requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amount in the aggregate to Seventy eight dollars.

"Eleventh.

"After the car service charges on the loaded cars had been assessed, the Agent of the Missouri Pacific under instructions from the Car Service Association demanded of the Mill Company the payment of the whole of the car service charges assessed, both the eighty six dollars on account of empty and the seventy eight dollars on account of loaded cars. Thereupon the Mill Company offered to pay the eighty six dollars on account of the empty cars, and refused to pay seventy eight dollars on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading.

69

"The Agent of the Missouri Pacific under the instruction of the Car Service Association refused to accept the eighty six dollars or any sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts with the understanding that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

"Twelfth.

"On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for car service charges, the Missouri Pacific by the direction of the Car Service Association ceased and refused to make further delivery to the Mill Company of empty cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in the refusal to make such further delivery of such empty cars to the Mill Company is to compel it to pay the whole of both amounts of car service charges under the understanding described in paragraph eleven by the enforcement of the rules of the car service association. The refusal to make
70 such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

"Thirteenth.

"As a result of the refusal to make delivery of empty cars as described in paragraph twelve, the Mill Company when desiring to ship any of its products from Stafford by the Santa Fe is compelled to haul the same in wagons from its mill to the station of the Santa Fe and load into cars from wagons. This entails upon the Mill Company great inconvenience and great additional expense in the management of its business.

"Fourteenth.

"During the period covered by the car service charges on loaded cars constituting the seventy eight dollars so demanded, an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned in Kansas. The freight service on that portion of its line was performed throughout the year — a single engine and train crew, passing from Conway to Larned and return. The transfer and switching service performed by the Missouri Pacific hereinbefore described, was performed by this single engine and crew. Ordinarily and by the train schedule this engine and crew passed through Staf-

d and performed such transfer and switching service once in the
ly part and once in the latter part of each day except Sunday;
l when so performed with reasonable promptness and regularity,
s single engine and crew were capable of performing the service
the satisfaction of the Mill Company. The engine so used was
and frequently defective and out of repair. The single engine
l crew were not sufficient or equal to meet the unusual demand
the business of that part of the line during the period mentioned,
l perform the transfer and switching service in question with
promptness or regularity.

"During the period mentioned the Mill Company made its
applications from time to time to the Santa Fe for such num-
of cars in addition to the loaded cars consigned to it which it
ght reasonably anticipate would arrive at the same time, as it
med necessary in its business, but not for a greater number of
s to be delivered at one time than, together with such loaded
s, it could load within the free time allowed if such empty and
ded cars were properly placed with reasonable promptness.

"Fifteenth.

'The crowded condition of the business on the Missouri Pacific
ring that period and the general character of its motive power and
in crew were well known to its agent, as well also to the Santa Fe
l to the Mill Company.

'When the Mill Company placed its applications for cars with
Santa Fe it could not certainly know the day on which they
uld be placed on the transfer track, or know with certainty on
at day loaded cars consigned to it over the Santa Fe would arrive
l be placed on the transfer track; or know that at such times such
s could not be properly placed by the Missouri Pacific with reason-
e promptness, and removed when reloaded with like promptness.
e Missouri Pacific did not better or increase its motive power or
in service to meet the increased and unusual demand of its busi-
s during the period mentioned.

"Sixteenth.

'I find as a fact that the detention of the loaded cars beyond the
e time allowed, on account of which the disputed car service to
amount of seventy eight dollars was assessed against the Mill
mpany, was caused as much by the fault and defective motive
ver and insufficient train service of the Missouri Pacific, as from
y fault or omission on the part of the Mill Company."

Section 2 of Rule IX. and section 1 of Rule X. of the Missouri Valley Car Service Association read as follows:

"SEC. 2. On deliveries to private sidings, should consignees or consignors refuse to pay or unnecessarily defer settlement bills for car service, the agent will decline to switch cars to the vate sidings of such parties, notifying them that deliveries will y be made to them on the public delivery tracks of the company,

after the payment of freight charges at his office. Agent will promptly notify Manager of action taken.

"SECTION 1. The Manager is authorized to entertain claims and refund car service charges in special cases. Claims should be made direct to the Manager, with paid car service bills attached, and each claim should carry with it a full statement of the grounds upon which reduction of the car service is requested."

These findings narrow the controversy to the matter of taking empty cars from the transfer track to plaintiff's mill and returning them when loaded.

It is argued that no contract exists between the defendant and the Santa Fe relating to the use of the transfer track and that the court cannot make one for them; that the defendant cannot be compelled to leave its own rails and its own right of way and go upon the rails and property of others to perform carriage services; and that the relief asked would indirectly require the defendant to devote a part of its main line to the use of the Santa Fe as a terminal. This argument does not reach the merits of the case. Under findings eighth and ninth the only question is if the plaintiff shall be given the same service afforded to other industries located at Stafford.

When the transfer track was built the defendant was under no obligation to do switching over it or from it either for the Santa Fe or for the shippers at Stafford. For the purpose of the discussion merely it may be conceded that it could not have been compelled to do so; that it had the absolute right to restrict its business to the operation of its own line as it now restricts its service over the transfer track to the handling of freight cars. But it did not exercise
73 its privilege. It voluntarily undertook to serve the public by switching cars just as it voluntarily undertook, in the beginning, to serve the public by operating its own road. It held itself out as a switching company and undertook to handle all cars loaded and empty which the shipping interests of Stafford required should pass over the transfer track, although compelled to leave its own track and right of way in order to do so. It relied upon the implied contract of the Santa Fe to pay the value of the service performed. The Santa Fe participated in this public profession and undertook to devote its property and resources to the proposed end. This conduct on the part of the two roads was in no respect *ultra vires*. It was in direct furtherance of the public purposes of their incorporation, and having held themselves out to the general public as ready and willing to render the service described they assumed all the duties which the law imposes in view of the nature of the business and the customs incident to it. The defendant became, and under the findings still is, a common carrier of loaded and empty freight cars to and from the transfer track and its own station a mile away. (Missouri Pacific Railway Co. v. Grocery Co., 55 Kan. 525.)

It is hornbook law that a carrier cannot renounce as against some disfavored shipper the public duty which it assumed when it engaged in the kind of transportation business which it offers to conduct. Being a common carrier for all, the defendant must switch all cars

dered for that purpose, including those intended for the mill
npany. It is equally elementary that a carrier may be compelled
mandamus to perform duties of this kind to an aggrieved shipper.
The findings of fact show that the plaintiff has not forfeited the
ht it claims. It is unnecessary to inquire if a carrier may discon-
ue all further service to a shipper on account of past infractions
reasonable rules adopted to secure better service to the public.
le IX of the Car Service Association does not provide for the in-
fliction of any such penalty but only requires that further
deliveries shall be made on public delivery tracks and not at
private sidings. Rule X in its application to this case, and
special order issued for the purpose of coercing the plaintiff, are
reasonable. A shipper ought not to be compelled to pay an
ust charge for car service with no redress but to submit a claim
the return of his money to the manager of the association pro-
lgating the rule or order. The weight of authority seems to be
t the carrier has a lien for compensation for the use of cars be-
d reasonable free time. If the lien be waved the courts are open.
t the Car Service Association holds no franchise to compel the
rment of claims of this kind, and then to decide for itself whether
not it will refund. And in any event a *a* carrier cannot justly
hhold its services when it is equally at fault in the matter of
ich it complains. (Finding Sixteenth.)

The defendant claims that an order restoring to the Mill Company
service it formerly received would regulate interstate commerce
far as cars destined to points outside the state are concerned.
t is plain that the taking of empty cars from the transfer track
l placing them at the mill is nothing more than preparation for
act of interstate traffic which is to begin later. It needs a ship-
nt of flour to initiate interstate commerce from the plaintiff's
l, and so long as the flour remains in the mill commerce has not
un. The mere purpose to use the cars in the future is not enough.
ey must be loaded with freight which is put in course of exporta-
n before state control over them is suspended. (Norfolk & West-
Ry. Co. *v.* Commonwealth, 93 Va. 749.)

After a car has been loaded and returned to the transfer track the
nta Fe may for lawful reasons decline to receive it. If it does
eive it there is neither a consignee nor a destination for it until
Mill Company has given shipping directions. The preliminary
ge has still not been passed. The movement from the point of
gin necessary to interstate commerce not only has not begun, but
may never begin. As remarked by Mr. Justice Bradley in the
case of Coe *v.* Errol, 116 U. S. 517, 526, "Though intended
for exportation they may never be exported; the owner has a
fect right to change his mind."

The custody of the carrier is not impressed with the change which
es the goods from domestic control until after they have been
lly released to it by the consignor for transportation to a destina-
n fixed beyond the state line; and under the custom prevailing
Stafford this does not occur until the cars have been taken to the

transfer track, received by the Santa Fe, and finally billed. In the case of Coe *v.* Errol already referred to it is said:

"It is true, it was said in the case of the Daniel Ball, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot is only an interior movement of the property, entirely within the State for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

There is still another test which may be applied. The Missouri Pacific engine for all practical and legal purposes simply takes the place of the plaintiff's teams in moving flour from the mill to the Santa Fe. Its work is that of switching cars. The service is
76 purely local. It is independently contracted for. It has no relation to the contract of carriage by virtue of which the freight is removed beyond the borders of the state. It has no relation to the ultimate destination of the cars handled. It begins and ends before the destination of any car is fixed, and is in fact nothing but a preliminary incident to the interstate journey. This being true it is subject to state control. (Penn. R. R. Co. *v.* Knight, 192 U. S. 21, and cases cited in the opinion.)

The facts in the case of Chicago, M. & St. P. Ry. Co. *v.* Becker, 32 Fed. 849, are in all essential respects analogous to those under consideration. The principles there applied are those which governed the decision of the Supreme Court of the United States in the Knight case. The opinion reads:

"The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road, or side tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills and deliver them to other lines of railway, or deliver cars to consignees received by it from other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the complainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar

fifty cents per car is exacted for this switching service rendered, h is claimed to be reasonable and just; but if the cars are to be sported over its own line to the point of destination, or come into city over complainant's main road, the service is free, and this rate and distinct charge, when made, is only for this local switch- This charge is not a part of the through rate fixed and de- ined beforehand, and has no reference to interstate shipment.

The transportation of cars over the switches from the ware- houses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and rate for performing the service fixed by virtue of the police r of the state, in the same manner as the carriage by dray per or distance is established for the public good. And I see no rence in the principle to be applied in such cases, although, dentally, they may be connected with interstate commerce. The ce is local, and there is nothing upon the face of the order of commissioners indicating that it is intended to regulate inter- commerce. Even if it is conceded that this carrying of freight the switches is an act of interstate commerce, it does not neces- y follow that the order of the commission affecting this traffic violation of the constitution of the United States. It is not y act that affects such commerce that amounts to a regulation and this order fixing the price per car for service rendered, and hich the order applies, is not related to the contract for carry- the freight outside the limits of the State of Minnesota, and is a part of it."

he case of Central Stock Yards Co. v. Louisville & N. R. Co. 118 113, 55 C. C. A. 63; 63 L. R. A. 213, is cited by the defendant. State of Kentucky attempted to seize upon shipments of live in the course of transportation by the railroad company from reign state and compel their delivery to a connecting carrier in r that they might reach a particular stock yard, although the sporting company provided adequate facilities for the delivery care of stock at another yard in the same city. Manifestly that an effort to regulate interstate commerce.

he case of McNeill *v.* Southern Railway Co. 202 U. S. 543, also by the defendant is of the same character. The state of North lina undertook to control the disposition of freight while in it from a foreign state. The following extract from the opinion fficient to show the inapplicability of the decision to the facts r consideration.

The cars of coal not having been delivered to the consignee, but ining on the tracks of the railway company in the condition in which they had been originally brought into North Caro- lina from points outside of that State, it follows that the in- terstate transportation of the property had not been completed the corporation commission made the order complained of. les *v.* Iowa, 170 U. S. 412."

he defendant insists finally that a writ of mandamus should not against it because the plaintiff has a plain and adequate remedy r section 4, chapter 340, Laws 1905, page 557, conferring cer-

tain power and authority upon the board of railroad commissioners.

It is not enough that a party have a plain and adequate remedy in order to deprive him of the right to the writ of mandamus. The remedy must also be one "in the ordinary course of the law." (Gen. Stats. 1901, Sec. 5185.)

A proceeding before the board of railroad commissioners is sufficiently out of the ordinary course of the law to distinguish it. Its characteristic feature is that it takes a mandamus suit in this court to complete the remedy. Otherwise it might not be adequate. Hence there is no reason why, in a case involving a right not of statutory creation and not depending upon any statute for its enforcement, the complainant may not apply directly to this court for the desired relief.

The peremptory writ of mandamus may issue, with costs to the plaintiff.

The court has authority to render judgment in favor of the plaintiff for any damage it has sustained (Gen. Stats. 1901, Sec. 5193). The plaintiff is given ten days in which to file a claim for damages, stating separately the character and amount of each item. The defendant is given ten days after notice of the filing of the claim in which to except to any items which it may deem not recoverable. The Court will then pass upon the exceptions if any be taken and make orders respecting a hearing.

All the Justices concurring.

A true copy.

Attest: —

——— ———,

Clerk Supreme Court.

79 And afterwards, on the 15th day of December, A. D. 1906, there was filed in the office of the clerk of the supreme court of the State of Kansas the plaintiff's claim for damages, which with the endorsements thereon is in words and figures as follows, to-wit:—

80 In the Supreme Court of Kansas.

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Plaintiff's Claim for Damages.

In compliance with the order and direction of this Court, the plaintiff hereby files its claims for damages, which it has necessarily sustained by reason of the unlawful act of the defendant in refusing to perform switching service for the plaintiff, and which claims are as follows:

First. The claim for hauling flour and mill feeds from the mill to the cars on the Santa Fe track; a force of men and teams was

ecessarily employed to do this transfer; the items to whom paid
e embraced in Schedule "A" hereto attached and made a part of
is claim and aggregating the sum of $1,056.39 up to December 8th,
06.

Second. A like proportion of expense for teams and laborers for
auling like products from the mill to the Santa Fe cars for every
ill day since up to the time that the traffic shall be resumed, and
hich will be for each of such days full $12.70.

Third. A force of four men employed for 83½ days up to De-
mber 8th 1906, two at the mill and two at the cars, to assist in
ading and unloading, being up to December 8th 1906, 83½ days
r four laborers at $1.50 each and making a total of $501.00.

Fourth. A like item for such labor at an expense of $6.00 per day
r each day subsequent to December 8th, 1906, that the traffic is
t resumed by defendant.

Fifth. For a complete shut down of the mill ½ day in November
d on December 1st, 3d and 4th, made necessary in consequence
muddy road, making it impossible to operate mill and transfer
rs, at a loss of the known profits of the mill of $250.00 for each
y and making an aggregate of $875.00.

Sixth. It is now coming the season of muddy roads and if the
affic is not resumed there will be a recurrence of times when the
mill will be compelled to stop running on account of bad
roads, and which loss is liable to be too severe and large not
to be taken into account at this time.

Seventh. From November 1st to December 8th, being days when
rn commenced to move, there have been 33 days in which the mill
as practically done no shipping or grinding corn or corn chops,
it could not get the cars for such purpose; that the corn business
mes off the Santa Fe and not the Missouri Pacific; that the mill
ad an established corn business over the Santa Fe until the transfer
as stopped; that it could not be transacted by hauling as the
our transfer monopolized all the facilities for transfer; that the
tablished business of plaintiff's mill has suffered loss in the sum of
eventy Five Dollars profit each mill day by cutting off this corn
siness and making a total of 33 days of $2,475.00.

Eighth. Until the traffic is resumed this loss to the business of the
ill, in not being able to transact any shipping of corn or corn
uffs as stated in the 7th item, will be continued until some time
February or March 1907 and the loss is too severe and will be too
eat to not provide for such loss.

Ninth. Paid to J. G. Waters, independently of hiring him in
is action $75.00 for going to Stafford for counsel and advice over
e stoppage of this transfer.

Tenth. Paid for three printed briefs filed in this Court in this
se the sum of $68.25.

Eleventh. Paid Vandiveer & Martin of Hutchinson. $25 for coun-
l and advice relating to the stoppage of this transfer business.

Twelfth. To cash paid out for expenses of F. D. and F. S. Larabee
making 6 trips to Topeka, and counting their time at $10 per
ay made necessary in and about this suit and aggregating $210.00.

Thirteenth. To expenses for three trips to Hutchinson $9.00.

Fourteenth. To cash paid and plaintiff's agreement to pay Waters & Waters, attorneys' fees in this case Twenty Five Hundred Dollars, $2,500.00.

Fifteenth. To further legal services, if this case is taken to the Supreme Court of the United States, whatever such services may be worth.

Respectfully submitted,

THE LARABEE FLOUR MILLS CO.,
By F. D. LARABEE,
By WATERS & WATERS,
Attorneys for Plaintiff.

82 *Statement.*

—— —, 190–.

M. —— ——:

SCHEDULE A.

In Account with The Larabee Flour Mills Co., Stafford, Kansas, U. S. A.

Millers of Kansas Hard Wheat Flours.

Capacity, 1,000 Bbls.

Elevators, 100,000 Bushels.

Date.	To Acc't Rendered:	Due.
9/8	N. C. Dawson	9.60
Do.	Mace Johnson	9.60
Do.	Geo. Hays	9.60
9/15	N. C. Dawson	17.25
Do.	Mace Johnson	22.65
Do.	E. Sims	4.50
Do.	L. H. Swinger	7.50
Do.	W. T. Johnson	4.50
Do.	H. P. Seens	12.00
Do. 9/21	C. E. Johnson	3.00
9/22	N. C. Dawson	18.00
Do.	M. Johnson	7.50
Do.	Ed. Sims	7.50
Do.	L. H. Swinger	9.00
Do.	W. T. Johnson	7.50
Do.	C. E. Johnson	7.50
Do.	Hays	4.50
Do.	D. A. Gardner	7.80
Do.	John Johnson	7.50
9/29	M. Johnson	18.00
Do.	J. M. Johnson	18.00
Do.	A. J. Herrell	15.00

)o.	L. W. Sloan	21.00
)o.	C. E. Johnson	15.00
)o.	Fred Mace	21.00
0/6	Mace Johnson	15.00
)o.	J. M. Johnson	15.00
)o.	A. J. Herrell	3.00
)o.	L. W. Sloan	3.00
)o.	C. E. Johnson	7.40
)o.	Fred Mace	9.60
)o.	W. T. Johnson	15.00
0/13	M. Johnson	16.50
)o.	J. M. Johnson	15.00
)o.	W. T. Johnson	15.00
)o.	H. P. Sims	12.00
0/20	M. Johnson	6.00
)o.	A. J. Herrell	9.00
)o.	W. T. Johnson	5.70
0/24	M. Johnson	14.25
)o.	A. J. Herrell	9.00
)o.	W. T. Johnson	14.25
)o.	J. M. Johnson	14.25
3		483.95
	Forward	483.95
1/3	Mace Johnson	18.00
)o.	A. J. Herrell	9.00
)o.	W. T. Johnson	18.00
)o.	J. M. Johnson	18.00
)o.	N. C. Dawson	3.75
)o.	C. E. Johnson	12.75
1/10	L. W. Sloan	13.50
)o.	M. Hall	23.20
)o.	M. Johnson	18.00
)o.	A. J. Herrell	13.50
)o.	W. T. Johnson	18.00
)o.	J. M. Johnson	16.30
)o.	C. E. Johnson	18.00
)o.	H. P. Sims	12.00
1/17	M. Johnson	18.00
)o.	W. T. Johnson	18.00
)o.	J. M. Johnson	18.00
)o.	C. E. Johnson	18.00
)o.	H. P. Sims	12.00
1/24	M. Johnson	12.75
)o.	W. T. Johnson	11.25
)o.	J. M. Johnson	11.25
)o.	C. E. Johnson	11.25
)o.	L. W. Sloan	3.00
)o.	W. E. Johnson	14.00
)o.	H. P. Sims	12.00

12/1	M. Johnson	15.75
Do.	A. J. Herrell	15.75
Do.	W. T. Johnson	15.00
Do.	J. M. Johnson	15.00
Do.	C. E. Johnson	15.00
Do.	L. W. Sloan	15.75
Do.	Ed. Sims	5.25
Do.	N. C. Dawson	3.00
Do.	Tom Taylor	3.00
12/8	Mace Johnson	8.22
Do.	A. J. Herrell	10.95
Do.	W. F. Johnson	4.84
Do.	J. M. Johnson	12.48
Do.	C. E. Johnson	11.80
Do.	L. W. Sloan	8.48
Do.	Ed. Sims	14.44
Do.	N. C. Dawson	14.75
Do.	Tom Taylor	11.48
		1056.39

Endorsed: No. 15167. In the Supreme Court of Kansas. The Larabee Flour Mills Co., Plaintiff, *vs.* The Missouri Pacific Railway Co., Defendant. Plaintiff's Claim for Damages. Waters & Waters, Attorneys for Plaintiff. Filed Dec. 15, 1906. D. A. Valentine, Clerk Supreme Court.

84 In the Supreme Court of the State of Kansas.

THE LARABEE FLOUR MILL COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

I, D. A. Valentine, clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above entitled cause as the same now remain on file and of record in my office.

Witness my hand and the seal of the Supreme Court of the State of Kansas hereto affixed at my office in Topeka, this 8th day of January, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

85 Hereafter follows the Petition for Writ of Error and Assignments of Error; the Order allowing Writ of Error and fixing the Supersedeas Bond and superseding the judgment; a copy of the Supersedeas Bond; the Writ of Error and the allowance thereof and the Citation, together with the acknowledgment of service thereof.

86 In the Supreme Court of Kansas.

THE LARABEE FLOUR MILLS COMPANY, a Partnership, Composed of F. D. and F. S. Larabee, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

The Missouri Pacific Railway Company, the above named defendant, considering its self aggrieved by the final decision of the Supreme Court of Kansas, in rendering judgment against it in the above entitled case, it hereby prays a writ of error from the decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

And the said, The Missouri Pacific Railway Company, defendant, as grounds for the issuance of said writ of error, alleges the following errors in the record and proceedings of said cause.

First. The Supreme Court of Kansas, erred in deciding that the service which the plaintiffs, by their proceedings in mandamus herein required the defendant, as a Railway Company, to perform for them, and which services the said court, by its order and judgment herein required defendant as such Railway Company to perform for plaintiffs, were not in any part service in the carriage of Interstate Commerce, and therefore governed in said defendant's performance thereof by the acts of Congress to regulate commerce and the amendments thereto, and that said acts of Congress and amendments, by their proper construction did not apply to govern the said defendant in the performance of said service or its refusal to perform the same.

Second. The Supreme Court of Kansas, erred in deciding that the subject matter of said suit, nor any part thereof was not governed by the provisions of the acts of Congress to regulate commerce and the amendments thereto.

87 *Third.* The Supreme Court of Kansas, erred in deciding contrary to Section 8, of Article 1, of the Constitution of the United States, and contrary to the acts of Congress to regulate commerce, and the amendments thereto, that the defendant was under legal obligation to perform service for plaintiff in the transfer and carriage of cars loaded with property, the subject of Interstate Commerce, and destined to points without the State of Kansas.

Fourth. The Supreme Court of Kansas, erred in deciding that defendant was under legal obligation to perform service for plaintiffs in the transfer and carriage of cars loaded with property, the subject of Interstate commerce and destined to points without the State of Kansas, whereby it has been deprived of its property without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Fifth. The Supreme Court of Kansas, erred in deciding that under the provisions of Chapter 345, of the laws of Kansas, of the year

1905, power and jurisdiction existed in it, the said court, to compel defendant to render service to plaintiffs in the transfer and carriage of property, the subject of Interstate Commerce, and destined to points without the State of Kansas.

Sixth. The Supreme Court of Kansas, erred in assuming jurisdiction of said suit, in so far as it involved the subject of Interstate Commerce, to-wit: The transfer or carriage of property designed for Interstate Commerce, and destined to points without the State of Kansas.

Seventh. The Supreme Court of Kansas, erred in deciding that Chapter 345 of the laws of Kansas, of 1905, and other like statutes of Kansas, were not invalid, in so far as they attempt to compel the transfer or carriage of property as Interstate Commerce, destined to points without the State of Kansas, because repugnant to Section 8 of Article 1, of the Constitution of the United States, and the acts of Congress to regulate Commerce and the amendments thereto.

88 For which errors the said Missouri Pacific Railway Company, defendant, prays that the said judgment of the Supreme Court of the State of Kansas, dated December 8th, 1906, be reversed, and it be restored to all things it has lost thereby.

——— ———,

B. P. WAGGENER,

Attorneys for the Missouri Pacific Railway Company.

STATE OF KANSAS, *Supreme Court, ss:*

Let the writ of error above prayed for issue upon the execution of a bond by The Missouri Pacific Railway Company, to The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee, in the sum of Twenty Thousand ($20,000.00) Dollars. Such bond when approved to act as a supersedeas.

Dated December 24th, 1906.

W. A. JOHNSTON,

Chief Justice Supreme Court of Kansas.

89 [Endorsed:] The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Petition for Writ of Error. Filed Dec. 24 1906 D. A. Valentine Clerk Supreme Court.

90 In the Supreme Court of Kansas.

THE LARABEE FLOUR MILLS COMPANY, a Partnership, composed of F. D. & F. S. Larabee, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Assignment of Errors.

Now comes the above, The Missouri Pacific Railway Company, and files herewith its petition for a writ of error and says that there

are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, it makes the following statement and assignment of said errors.

First. The Supreme Court of Kansas, erred in deciding that the service which the plaintiffs, by their proceedings in mandamus herein required the defendant as a Railway Company to perform for them, and which services the said court, by its order and judgment herein required defendant as such Railway Company to perform for plaintiffs, were not in any part service in the carriage of Inter-State Commerce, and therefore governed in said defendant's performance thereof by the acts of Congress to regulate commerce and the amendments thereto, and that said acts of Congress and amendments, by their proper construction did not apply to govern the said defendant in the performance of said service or its refusal to perform the same.

Second. The Supreme Court of Kansas, erred in deciding that the subject matter of said suit, nor any part thereof was not governed by the provisions of the acts of Congress to regulate commerce and the amendments thereto.

91 *Third.* The Supreme Court of Kansas, erred in deciding contrary to Section 8, of Article 1, of the Constitution of the United States, and contrary to the acts of Congress to regulate commerce, and the amendments thereto, that the defendant was under legal obligation to perform service for plaintiffs in the transfer and carriage of cars loaded with property, the subject of Interstate Commerce, and destined to points without the State of Kansas.

Fourth. The Supreme Court of Kansas, erred in deciding that defendant was under legal obligation to perform service for plaintiffs in the transfer and carriage of cars loaded with property, the subject of Interstate commerce and destined to points without the State of Kansas, whereby it has been deprived of its property without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Fifth. The Supreme Court of Kansas, erred in deciding that under the provisions of Chapter 345, of the laws of Kansas, of the year 1905, power and jurisdiction existed in it, the said court, to compell defendant to render service to plaintiffs in the transfer and carriage of property, the subject of Interstate Commerce, and destined to points without the State of Kansas.

Sixth. The Supreme Court of Kansas, erred in assuming jurisdiction of said suit, in so far as it involved the subject of Interstate Commerce, to-wit: The transfer or carriage of property designed for Interstate Commerce, and destined to points without the State of Kansas.

Seventh. The Supreme Court of Kansas, erred in deciding that Chapter 345 of the laws of Kansas, of 1905, and other like statutes of Kansas, were not invalid, in so far as they attempt to compell the transfer or carriage of property as Interstate Commerce, destined to points without the State of Kansas, because repugnant to Section 8 of Article 1, of the Constitution of the United States, and

the acts of Congress to regulate Commerce and the amendments thereto.

92 For which above stated errors the defendant, The Missouri Pacific Railway Company, prays that the judgment of the Supreme Court of the State of Kansas, dated December 8th, 1906, be reversed, and that it be restored to all things which it has lost thereby.

B. P. WAGGENER,
Attorneys for the Missouri Pacific Railway Company.

93 [Endorsed:] The Larabee Flour Mills Company a partnership, composed of F. D. and F. S. Larabee, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Assignment of Errors. Filed Dec. 24 1906. D. A. Valentine, Clerk Supreme Court.

94 *Journal Entry of Allowance of Writ of Error and Superseding Judgment.*

No. 15167.

THE LARABEE FLOUR MILLS COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

The defendant, the Missouri Pacific Railway Company, having presented its application for a writ of error to the supreme court of the state of Kansas to correct the judgment rendered by the said court against it, in the suit wherein the Larabee Flour Mills Company was plaintiff and the Missouri Pacific Railway Company was defendant, and having presented with their application their due assignment of errors in that regard, present now a citation to be signed; accordingly it is ordered that said writ of error be allowed and said citation signed upon the said defendant giving to the said plaintiff a good and sufficient bond in the sum of $20,000.00, conditioned that said defendant shall prosecute its writ of error to effect, and if it fail to make good its plea shall answer all damages and costs, said security and bond to be approved by this court, or one of the Justices thereof, and the writ thereunder to be a supersedeas; and thereupon said defendant now presents a bond with a good and sufficient surety in said sum of $20,000.00, as aforesaid, which is approved by the chief justice and ordered filed with the clerk of the supreme court of the state of Kansas.

95 In the Supreme Court of Kansas.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE LARABEE FLOUR MILLS COMPANY, a Partnership, Consisting of F. D. and F. S. Larabee, Defendants in Error.

Bond.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as principal, and B. P. Waggener and J. P. Brown as sureties, are held and firmly bound unto F. D. and F. S. Larabee, as partners, under the firm name of the Larabee Flour Mills Company, in the sum of Twenty Thousand ($20,000.00) Dollars, to be paid to them the said F. D. and F. S. Larabee, as said partners, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 24th day of December, 1906.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas, in favor of said F. D. and F. S. Larabee, as partners, under the firm name of The Larabee Flour Mills Company, against The Missouri Pacific Railway Company; and to supercede the said judgment rendered therein.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC R'L'Y CO.,
By B. P. WAGGENER, *Gen'l Att'y.*
B. P. WAGGENER.
J. P. BROWN.

Bond approved and to operate as a supersedeas.
W. A. JOHNSTON, *Chief Justice.*

96 STATE OF KANSAS, *Atchison County, ss:*

We, B. P. Waggener and J. P. Brown, each of the City of Atchison, Atchison County, Kansas, do solemnly swear that we are each worth, in our own names, over and above all debts and exemptions, the sum of twenty thousand dollars ($20,000.), so help us God.

B. P. WAGGENER.
J. P. BROWN.

Subscribed and sworn to before me this 22" day of December, 1906.

My commission expires February 3rd, 1906.

[SEAL.] CORA N. TERRY,
Notary Public.

Endorsed:—The Missouri Pacific Railway Company, Plaintiff in Error, *vs.* The Larabee Flour Mills Co., a partnership, consisting of F. D. and F. S. Larabee, Defendants in Error. Supersedeas Bond. Filed Dec. 24 1906. D. A. Valentine Clerk Supreme Court.

97 The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of the State of Kansas on December 24th, A. D., 1906, and the following endorsement made thereon:

Supersedeas Bond filed December 24th, 1906. D. A. Valentine, Clerk Supreme Court. Bond approved and to operate as a supersedeas. W. A. Johnston, Chief Justice.

98 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the certain suit between The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee, and The Missouri Pacific Railway Company, wherein was drawn in question the construction of a clause of the Constitution of the United States, and likewise the construction of acts of Congress of the United States enacted in pursuance of such Constitution, and wherein was also drawn in question the validity of a statute of the said State of Kansas, and of an authority exercised under said State, on the ground of their being repugnant to the Constitution and the laws of the United States, and the decision was against the title, right, privilege or exemption specifically set up or claimed under the said Constitution and the said Statute, and the said decision was likewise in favor of the validity of said statute of said state, and the authority exercised under it, a manifest error has happened to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of December, in the year our Lord one thousand nine hundred and six.

[Seal of the Circuit Court of the United States, District of Kansas.]

GEO. F. SHARITT,
Clerk Circuit Court United States, District of Kansas.

Allowed.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee, Plaintiff, *vs.* he Missouri Pacific Railway Company, Defendant. Writ of Error. led Dec. 24, 1906. D. A. Valentine, Clerk Supreme Court.

The original of the foregoing writ of error was lodged with the clerk of the Supreme Court of the State of Kansas, December 24th, A. D., 1906, and also at the same time and place a py thereof for the defendant in error, The Larabee Flour Mills mpany; one of said copies being addressed personally to said dant in error. The following endorsement was made upon said ginal writ and upon each copy: Writ of error. Filed December th, 1906. D. A. Valentine, Clerk Supreme Court. To the Lara- Flour Mills Company, etc., defendant in error.

Citation.

HE UNITED STATES OF AMERICA, *ss:*

he President of the United States to F. D. and F. S. Larabee, as Partners, doing business under the name of The Larabee Flour Mills Company, Greeting:

You are hereby cited and admonished to be and appear at and be- e the Supreme Court of the United States at Washington, D. C., hin thirty days from the date hereof, pursuant to a writ of error d in the office of the Clerk of the Supreme Court of the State of nsas, wherein The Missouri Pacific Railway Company, is plain- in error, and you are defendants in error, to show cause, if any re be, why the judgment rendered against the said plaintiff in or, as in said writ of error mentioned, should not be corrected, d why speedy justice should not be done the parties in that be- f.

Witness, the Chief Justice of the Supreme Court of the State of nsas, this 24th day of December 1906.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

TOPEKA, KANSAS, *December 24th,* 1906.

I, —— ——, Attorney- of record for the defendant in error in the above mentioned case, hereby acknowledge due service of the above citation, and enter an appearance on behalf of the said defendants in error, in the Supreme Court of the United States. Service also on us, of copy of petition in error, assignments of error, writ of error and bond acknowledged.

I. G. WATERS AND
J. C. WATERS,
Attorneys for F. D. and F. S. Larabee, Partners as The Larabee Flour Mills Company.

103 [Endorsed:] The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee, Plaintiff, *vs.* The Missouri Pacific Railway Company, Defendant. Citation. Filed Dec. 24, 1906. D. A. Valentine, Clerk Supreme Court.

104 SUPREME COURT, *State of Kansas, ss:*

I, D. A. Valentine, Clerk of said Court, do hereby certify that there was lodged with me as such clerk on December 24th, A. D., 1906, in the case of The Larabee Flour Mills Company, a Partnership etc., plaintiff, versus The Missouri Pacific Railway Company, a Corporation, defendant,

1. The original bond of which a copy is herein set forth;

2. Two copies of the writ of error as herein set forth, one for the defendant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Topeka, Kansas, this 8th day of January, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of Supreme Court of Kansas.

105 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas in the City of Topeka this 8th day of January, A. D., 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

Endorsed on cover: File No. 20,550. Kansas supreme court. Term No. 585. The Missouri Pacific Railway Company, plaintiff in error, *vs.* The Larabee Flour Mills Company, a partnership, composed of F. D. and F. S. Larabee. Filed January 28th, 1907. File No. 20,550.

SUPREME COURT OF THE UNITED STATES.

No. 214, October Term, 1907.

The Missouri Pacific Railway Company, Plaintiff in Error,
v.
The Larabee Flour Mills Company, Defendant in Error.

Stipulation.

By and with the consent of the Court, it is hereby stipulated, that the following clause in the Journal Entry of Judgment found on page 30 of the printed transcript of the record, towit:

"and further commanding it to at once and without delay issue upon all shipments of grain by the plaintiff, Larabee Flour Mills Co. in car load lots from its mill and elevator at said station, without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor."

is hereby withdrawn and the same is not to be considered by the Court, and the motion to correct the record by the defendant in error is accordingly withdrawn. It is further stipulated, that the hearing of this cause is to be continued to the October Term 1908; each party having permission to file additional briefs herein on or before October 1st 1908, and to be served by that time on the other party.

Dated Washington, D. C. April 20th 1908.

B. P. WAGGENER,
Att'ys for Pldintiff in Error.
W. H. ROSSINGTON,
JOSEPH G. WATERS,
Att'ys for Def't in Error.

[Endorsed:] File No. 20,550. Supreme Court of the United States. October Term, 1907. Term No. 214. The Missouri Pacific Ry. Co., Pl'ff in Error, *v.* The Larabee Flour Mills Co. Stipulation to correct transcript of record, to withdraw motion to correct record and to continue cause. Filed April 21st, 1908.

Office Supreme Court, U. S.
FILED.
JAN 4 1908
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

The Missouri Pacific Railway Company,
Plaintiff in Error,
v.
The Larabee Flour Mills Company,
Defendant in Error.

No. 16.

MOTION TO FILE AND CONSIDER AMENDMENT TO RECORD.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
Attorneys for Defendant in Error.

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IN THE SUPREME COURT
OF THE
UNITED STATES.

The Missouri Pacific Railway Company,
Plaintiff in Error,
v.
The Larabee Flour Mills Company,
Defendant in Error.
No. 214.

TO THE HONORABLE B. P. WAGGENER:

You are hereby respectfully notified that said defendant in error will forthwith file and at the hearing of the above-entitled cause will apply for the allowance of the motion, copy of which is hereto annexed, at the time the above-entitled cause comes on for hearing in the Supreme Court of the United States, or sooner if the Court shall so determine, of which hearing you shall have due notice.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
Attorneys for Defendant in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

The Missouri Pacific Railway Company, Plaintiff in Error, v. The Larabee Flour Mills Company, Defendant in Error.	No. 214.

MOTION TO FILE AND CONSIDER AMENDMENT TO RECORD.

Comes now said defendant in error, The Larabee Flour Mills Company, by its counsel, and moves the Court here as follows:

THAT WHEREAS, the said defendant in error has heretofore moved the Supreme Court of Kansas to correct a certain error appearing in the record of judgment in the case pending in that Court under the appeal taken and prosecuted in this case, so that said record may be thereby corrected to speak the truth and to definitely and truly state what was decided in that Court from whence this appeal was taken, as the same more fully appears in the record of proceedings

of said Supreme Court of Kansas in that behalf, a duly certified copy whereof and of all proceedings relating thereto is hereunto appended and marked "Exhibit A;" and

WHEREAS, upon said motion, of which said plaintiff in error had due notice and appeared thereto and resisted the same, the said Supreme Court of Kansas made a certain order correcting said judgment *nunc pro tunc* as the same should have been entered in the Supreme Court of Kansas originally, which said order fully appears in said Exhibit A, hereto appended; and

WHEREAS, the record as now filed here in the above-entitled cause embodies said improper and untruthful judgment uncorrected, and as improperly entered in the Kansas Supreme Court, the said defendant in error, The Larabee Flour Mills Company, by its counsel, moves the Court here to allow and direct that the said corrected judgment and the proceedings related thereto as appears in Exhibit A be filed as part of the record in this case and that the same be duly considered in the hearing and determination thereof in this court.

Respectfully submitted,

W. H. ROSSINGTON,

CHAS. BLOOD SMITH,

Attorneys for Defendant in Error.

Exhibit A.

IN THE SUPREME COURT OF THE STATE OF KANSAS.

THE LARABEE FLOUR MILLS COMPANY, *Plaintiff*,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*.
No. 15,167.

Transcript of proceedings on motion to correct judgment.

BE IT REMEMBERED, that on the 2nd day of December, 1907, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a motion to correct the journal entry of judgment in the above-mentioned cause, which motion remains on file and of record in the office of the clerk of said Court, and is in words and figures as follows; to wit:

IN THE SUPREME COURT OF THE STATE OF KANSAS.

THE LARABEE FLOUR MILLS COMPANY, A PARTNERSHIP, *Plaintiff*,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*.
No. 15,167.

To the Honorable Bailie P. Waggener,

Attorney for said Defendant:

You are hereby notified that at the sitting of the said Court in Topeka, Kansas, on Tuesday, November 5, 1907, at 9:30 o'clock A. M. of said day, or as soon thereafter as the same can be heard, in the court room of said Court in the State Capitol at Topeka, Kansas,

we will move to have the judgment in the above-entitled cause corrected *nunc pro tunc*, by the omission therefrom of the following words:

"And that you at once and without delay issue upon all shipments of grain by the plaintiff in car-load lots, from its mill and elevators at said station, without the condition in the bills of lading therefor, that it is not responsible for loss or damage therefor."

And that you may then and there be present to be heard upon said motion.

Copy of said motion is hereto attached.

JOSEPH G. WATERS,
W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
Attorneys for Plaintiff.

The undersigned, attorney for said defendant, hereby acknowledges service of a copy of the foregoing notice this 2 day of November, A. D. 1907.

B. P. WAGGENER,
Attorney for said Defendant.

IN THE SUPREME COURT OF THE STATE OF KANSAS.

THE LARABEE FLOUR MILLS COMPANY, *Plaintiff*,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*.
No. 15,167.

Now comes The Larabee Flour Mills Company, a partnership, plaintiff, and moves the Court here for a correction of the record of judgment, *nunc pro tunc*,

so as to speak the truth and record the true judgment of the Court in this cause, as hereinafter fully appears.

And said plaintiff in this behalf respectfully shows unto the Court that in the alternative writ issued by this Court the following command:

"And that you at once and without delay issue upon all shipments of grain by the plaintiff in car-load lots, from its mill and elevators at said station, without the condition in the bills of lading therefor, that it is not responsible for loss or damage therefor."

And thereupon concluding with the usual order of an alternative writ that they do the things in said alternative writ commanded or show cause why the writ of peremptory mandamus should not be allowed.

That thereafter, as appears from the record in this cause, the said cause proceeded until the 2nd day of November, 1906, when said plaintiff, by its attorneys, entered or caused to be entered, and the same is a part of the record of this case, its certain withdrawal of application for mandamus to compel the defendant to issue certain bills of lading in words as follows, to wit:

"The plaintiff respectfully withdraws from the consideration of the Court that part of its application for the writ of mandamus to compel the defendant to issue certain bills of lading, leaving as the one issue to be tried, the resumption of switching service by the defendant over the transfer track for the plaintiff."

That thereafter said case proceeded to hearing upon

its merits upon the pleadings and upon the report of H. C. Sluss, commissioner to take testimony, and report findings of fact, and the judgment was in favor of the plaintiff. That the argument in said cause was confined and the hearing and determination of said Court, as plaintiff believes and understands, was limited in conformity to the withdrawal aforementioned and was so considered and adjudged by the Court; that the record of judgment and the peremptory writ was prepared and filed by the clerk of this Court, but by mistake and oversight the said clerk in preparing the peremptory writ included therein a peremptory command, as the same appears in the alternative writ, containing the things withdrawn, namely:

"And that you at once and without delay issue upon all shipments of grain by the plaintiff in car-load lots, from its mill and elevators at said station, without the condition in the bills of lading therefor that it is not responsible for loss or damage therefor."

That said plaintiff believes and is advised that said words were not a part of the judgment of the Court, but were by the Court advisedly and explicitly omitted from its judgment and ought not to appear in the peremptory writ.

WHEREFORE, said plaintiff prays that said words by [be] stricken from the said judgment and peremptory writ of this Court and the clerk be ordered to so correct

said peremptory writ, omitting said words, and for such other order as the Court shall deem meet and proper to make the record speak the truth and express the judgment of the Court in that behalf; and that such correction shall relate back to the time of rendering said judgment as if said words had never been incorporated in the record thereof.

All of which is respectfully submitted.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
JOSEPH G. WATERS,
Attorneys for Plaintiff.

Endorsed:—No. 15,167.

Kansas Supreme Court. The Larabee Flour Mills Co. v. The Missouri Pacific Ry. Co. Motion to Correct Judgment.

Filed Nov. 6, 1907. D. A. Valentine, Clerk Supreme Court.

W. H. Rossington, Chas. Blood Smith, Attorneys for Plaintiff.

AND BE IT FURTHER REMEMBERED, that on the 16th day of December, 1907, before the Supreme Court of the State of Kansas, in session at its court room in the city of Topeka, the following proceeding, among others, was had and remains of record at page——,

Journal —, of said Court in words and figures as follows, to wit:

No. 15,167. *Journal Entry.*

Upon the 2d day of Dec., 1907, and at the regular July, 1907, term of the Court, this cause came on to be heard upon the motion of the plaintiff to correct a clerical mistake in the record of the judgment heretofore rendered herein.

The Court finds that the defendant has been duly notified of the hearing. The respective parties appeared by counsel and the cause was argued orally by Mr. W. H. Rossington for the plaintiff and by Mr. B. P. Waggener for the defendant. After the submission of the cause the Court took the same under advisement. Upon the 16th of Dec., 1907, and at the same term of Court the matter coming on for decision, the Court, being fully advised in the premises, finds that the ground of the motion is well taken and that the clerical error therein pointed out should be corrected. Upon its own examination of the record as prepared by the clerk the Court further finds that a clerical error occurs therein not specified in the motion and that it likewise be corrected.

It is therefore considered, ordered and adjudged that the record of the judgment in this case be cor-

rected in respect to the matters referred to to read as follows:

"That a peremptory writ of mandamus issue commanding the defendant immediately to resume and to restore to the plaintiff the service of transferring empty freight cars from the transfer track of the Atchison, Topeka & Santa Fe Ry. Co. at the station of Stafford in Stafford County, Kansas, to the plaintiff's mill and elevators at said station, and loaded freight cars from the plaintiff's said mill and elevators to and upon said transfer track, as heretofore, and upon the same terms and conditions as similar services are performed for other industries located at Stafford."

This order relates in time to the date of the rendition of the judgment. The defendant duly excepted and its exception is allowed.

The claim of the defendant for the allowance of certain costs is disallowed. The defendant excepted and its exception is allowed. No costs shall be taxed to either party on account of this proceeding.

And also on the 16th day of December, 1907, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the syllabus and opinion of said Court in this cause, which syllabus and opinion are in words and figures as follows, to wit:

THE LARABEE FLOUR MILLS COMPANY,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.
No. 15,167.

Proceeding to Correct the Record. Correction Ordered.

SYLLABUS BY THE COURT. BURCH, J.

1. Clerical mistakes in the record of a judgment rendered in an original proceeding in this Court may be corrected to the end that the record may speak the truth after the lapse of the term, after proceedings in error to review the judgment have been instituted in the Supreme Court of the United States and notwithstanding a supersedeas bond has been filed.

2. Such corrections may be made on the motion of any interested party or on the Court's own motion whenever the mistakes are brought to its attention.

All the Justices concurring.

THE LARABEE FLOUR MILLS COMPANY,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.
No. 15,167.

Proceeding to Correct the Record. Correction Ordered.

The opinion of the Court was delivered by

BURCH, J.: The plaintiff commenced in this Court an original proceeding in mandamus against the defendant which upon December 8th, 1906, and at the July, 1906, term of the Court resulted in a judgment

adverse to the defendant. Soon afterward proceedings were instituted to obtain a review of the judgment by the Supreme Court of the United States. All steps necessary to that end were duly taken and an approved supersedeas bond was filed.

When called upon to brief the cause for hearing in the federal court the plaintiff discovered in the record of the judgment and in the peremptory writ of mandamus prepared for service before the judgment was superseded certain matters which had been embodied in the petition and in the alternative writ but which did not comport with the opinion rendered in the decision of the case and upon which the judgment of the Court rested. Although the term of Court at which the judgment was rendered had gone by and the defendant had sought, in the proceeding in error in the federal court, to take advantage of the form in which the record presented itself, the plaintiff filed a motion to correct the record so that it might speak the truth, alleging that a mistake had been made in entering the judgment.

At the hearing on the motion the memory of the Court was refreshed by statements of counsel respecting the proceedings, but knowledge of the fact as to what the judgment of the Court actually was rested, of course, with the Court itself.

After issues had been framed in the main cause a commissioner was appointed to take the testimony and report to the Court findings covering the facts of the controversy. The findings returned eliminated some of the plaintiff's claims and fortified others. No objection was made to the findings by either party. No motion was made to set any of them aside upon any ground and the cause was argued and submitted to the Court upon the findings as a correct relation of the facts upon which the rights of the parties were to be declared. Besides this, after the commissioner's report had been filed and before the hearing the plaintiff filed a document reading as follows:

"The plaintiff respectfully withdraws from the consideration of the Court, that part of its application for the writ of mandamus to compel the defendant to issue certain bills of lading, leaving as the one issue to be tried, the resumption of switching service by the defendant over the transfer track for the plaintiff."

It is the duty of the clerk to enter judgments of the Court upon the record. The Court does not formulate them. In this instance the only specific direction given was that a peremptory writ should issue. In making up the record the clerk inadvertently passed over the findings of fact, the plaintiff's withdrawal and the opinion of the Court, as guides, and followed the petition and the alternative writ. Consequently a mistake

was made and matters not a part of the judgment were written into the record as features of it. The question is if the record may now be made to speak the truth.

In the case of *Christisen v. Bartlett*, 73 Kan. 401, the syllabus reads:

"A district court has the power to correct the entry of a judgment so as to cause it to speak the truth after the expiration of the term at which it was rendered, and upon the personal knowledge of the judge of what took place in court at the time of its rendition."

Subsequently, upon a rehearing, a further opinion was rendered, the syllabus of which reads:

"A district court has inherent power to correct the record of its proceedings so that it shall speak the truth and show what actually took place. This power is not lost by lapse of time, and may in the discretion of the court be exercised upon its own motion and without notice to the parties affected."

In the last opinion it was said:

"A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see that its records speak the truth is an affirmative and active one, and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion or that the other should have notice before action is taken." (73 Kan. 406.)

This conclusion was reached upon a review of the authorities and expresses the settled law of this State.

This Court has all the inherent power that any court of record may have over its records and the rules of law stated apply to this proceeding as clearly as if it were one in an inferior court.

The fact that a proceeding is now pending in the Supreme Court of the United States to review the judgment does not deprive this Court of its power to expunge from its records the mistakes of its recording officer. The conduct of the Court itself is not the subject of modification. The only purpose of the motion is that the conduct of the Court may be truthfully exhibited and it may be surmised that the reviewing Court has little concern for matters which were not adjudicated.

In the case of *Investment Company v. Walsh*, 70 Kan. 899, a somewhat analogous question was presented. The opinion reads:

"A district court has the power and jurisdiction to correct a journal entry of a judgment to make it speak the truth as to the judgment which was in fact originally rendered, even after such judgment, manifested by a certified copy of such erroneous journal entry, has been reviewed on proceedings in error in this Court and such judgment has been affirmed, when it clearly appears from the whole record that, by reason of clerical mistakes, the journal entry does not express the judgment which was in fact rendered, and where it also clearly appears that the errors corrected were not called to the attention of this Court upon the review, and that the decision of this Court, affirming

such judgment, was in no way based upon such clerical mistakes.

The correction of such journal entry under such circumstances is not the rendition of a new judgment, nor the changing of a judgment which has been affirmed by this Court."

The supersedeas had no effect except to stay proceedings in further prosecution of the suit and to prevent the enforcement of the judgment. The power of the Court to make up its records in due form was not disturbed.

In *Hovey v. McDonald*, 109 U. S. 150, 157, it is said:

"One of the qualifications of the general rule as to the suspensive effect of an appeal is, that the inferior court may perfect its judgment or decree, usually at any time during the term at which it is rendered. If, when an appeal is taken or a writ of error is sued out, the record has not been made up, it may be made up in due form. If any obvious mistake has occurred, it may be corrected; as where the jury by mistake has given damages in a penal action, or has given damages for a larger sum than the declaration demanded, the plaintiff may enter a remittitur of the damages on the record, after a writ of error is brought. Tidd's Pract. 942. And it is laid down as a general rule, at law (the principle of which is equally applicable to chancery proceedings), that those things which are amendable before error brought, are amendable afterwards, so long as diminution may be alleged and *certiorari* awarded—provided, of course, that the time for amendment has not passed by. (Tidd, 714.)

The time within which this Court might perfect its record not having lapsed it follows that the motion of the plaintiff should be granted.

Upon an examination of the clerk's entry the Court discovers that it contains matter not in accordance with the judgment to which the motion does not refer. The alternative writ commanded that the defendant resume its service to the plaintiff "upon demand and upon the payment of the heretofore customary charges therefor."

The fifth, sixth, seventh, eighth and ninth findings of fact read as follows:

"The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notify it of the switching; the Santa Fe would take the cars, bill them to destination, collect all freight and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue bill of lading, way-bill, or receipt, or present or collect bills for freight or switching charges."

"When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill, the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe."

"In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a

deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning cars as heretofore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the State, and cars intended to carry to points within the State of Kansas."

"The custom and practice described in the fifth and sixth paragraph prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company."

"I find as a fact that the Santa Fe and Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in car-load lots out over the Santa Fe; and also hold themselves out and undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford."

The Court commented upon these findings in part as follows:

"It (the defendant) held itself out as a switching company and undertook to handle all cars loaded and empty which the switching interests of Stafford required should pass over the transfer track, although compelled to leave its own track and right of way in order to do so. It relied upon the implied contract of the Santa Fe to pay the value of the service performed. The Santa Fe participated in this public profession and

undertook to devote its property and resources to the proposed end." (74 Kan. 817.)

The determination of the Court was that the defendant should serve the plaintiff as it does all other industries located at Stafford. The record of the judgment, however, through the misapprehension of the clerk, follows the alternative writ and hence is incorrect.

In the case of *Strickland v. Strickland*, 95 N. C. 471, cited in *Christinsen v. Bartlett, supra*, it is said:

"The court did not enter the judgment it intended to enter, nor that authorized by what appeared in the record. Such errors may be corrected at any time, and after a long while, upon motion, or the court may and ought to correct them *ex mere motu* as soon as it sees them. This is necessary and proper, to the end the record shall speak the truth. The object is to make the record show what the court, in fact, resolved, intended, and in contemplation of law did."

It follows that the mistake observed by the Court and not referred to in the motion may also be corrected.

The record of the judgment in this cause is corrected to read, with respect to the matters under consideration, as follows:

"That a peremptory writ of mandamus issue commanding the defendant immediately to resume and to restore to the plaintiff the service of transferring empty freight cars from the transfer track of the Atchison, Topeka & Santa Fe Ry. Co. at the station of

Stafford, in Stafford County, Kansas, to the plaintiff's mill and elevators at said station, and loaded freight cars from the plaintiff's said mill and elevators to and upon said transfer track, as heretofore, and upon the same terms and conditions as similar services are performed for other industries located at Stafford."

This order relates in time to the date of the rendition of the judgment. An exception is, of course, allowed to the defendant.

The defendant claims that in consequence of the allowance of the motion it should be awarded the cost of its proceeding in error in the Supreme Court of the United States.

The petition for the writ of error and the assignments of error in that proceeding show that it was not undertaken upon the sole basis of the matter erroneously incorporated in the record of the judgment. On the other hand numerous grounds of error are laid not affected by the correction of the record and no purpose to abandon the further prosecution of the cause in the Supreme Court of the United States because of the correction of the record has been indicated. Therefore, the claim is disallowed.

No costs will be taxed to either party on account of this proceeding.

All the Justices concurring.

IN THE SUPREME COURT OF THE STATE OF KANSAS.

THE LARABEE FLOUR MILLS COMPANY,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.

I. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the proceedings on the motion to correct judgment, including the motion to correct judgment, amended journal entry of judgment and the syllabus and opinion of the Court on said motion in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court at my office in the city of Topeka, this 16th day of December, A. D. 1907.

(Seal Sup. Ct.
State of Kansas.)

D. A. VALENTINE,
Clerk of the Supreme Court
of the State of Kansas.

IN THE

SUPREME COURT OF THE UNITED STATES.

Supreme Court, U. S.
FILED
OCT 18 1909
JAMES H. McKENNEY
Clerk

No. 16.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE LARIMER FLOUR MILLS COMPANY, A
PARTNERSHIP COMPOSED OF E. D. AND
W. S. ARMBEE, DEFENDANTS IN ERROR.

ADDITIONAL BRIEF AND ARGUMENT.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR.

VS.

THE LARABEE FLOUR MILLS COMPANY, A PARTNERSHIP COMPOSED OF F. D. AND F. S. LARABEE, DEFENDANTS IN ERROR.

ADDITIONAL BRIEF AND ARGUMENT.

It is conceded that the application for the writ of mandamus which was granted by the state court did not involve the consideration of any state statute, or duty imposed by any legislative enactment, or any order of a state railway commission, or other administrative board or tribunal.

It is conceded that each the Missouri Pacific Railway Company and the Atchison, Topeka & Santa Fe Railway Company is an interstate carrier, and as such subject to the provisions of the act of Congress to regulate commerce, and the amendments thereto.

It is conceded that there were no contractual rela-

tions between the Missouri Pacific Railway Company and the mill company which imposed any duty on the railway company to the mill company, or which created any obligation on the part of the railway company. There is no allegation in the pleadings of any unjust discrimination by the Railway Company against the Mill Company.

We submit:

FIRST PROPOSITION.

THE SUPREME COURT OF KANSAS HAD NO JURISDICTION OR POWER UNDER THE CONSTITUTION OF THE STATE TO MAKE THE ORDER COMPLAINED OF, AND THE ENFORCEMENT OF IT WOULD NOT BE DUE PROCESS OF LAW, AND WOULD DENY TO THE RAILWAY COMPANY THE EQUAL PROTECTION OF THE LAW.

The constitution of the State of Kansas, like the constitution of the United States, has created three departments of government—the executive, the legislative and the judicial.

> "*Article* 1.—*Executive.*
>
> Section 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general and superintendent of public instruction.

Article II.—Legislative.

Section 1. The legislative power of this state shall be vested in a house of representatives and senate.

Article III.—Judicial.

Section 1. The judicial power of this state shall be vested in a Supreme Court, District Courts, probate courts, justices of the peace, and such other courts, inferior to the Supreme Court, as may be provided by law."

The legislature of Kansas, in 1898, created what was known as the Court of Visitation, by an act entitled: "An Act creating a Court of Visitation, declaring its jurisdiction and powers, and providing for proceedings and procedure therein."

In the case of the *State* v. *Johnson*, 61 Kansas, 803, the constitutionality of the act was challenged, and it was held unconstitutional by the Supreme Court of Kansas, "for the reason that, in the powers conferred upon that tribunal, legislative, judicial and administrative functions are commingled and interwoven in a manner violative of the constitutional requirement that the three great departments of government be kept separate, and the powers and duties of each exercised independently of the other." The court, among others things, said:

> "The framers of the constitution of the United States were influenced by the doctrine of Montesquieu, then in the height of its influence, that the powers essential to governments should be distribut-

ed among three separate bodies of magistrates, viz: legislative, executive and judicial. Madison, in No. 47 of the Federalist, page 375, affirmed that such doctrine was recognized by the convention as the foundation of its labors. Montesquieu wrote:

'There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'

It will be noticed that there is no express provision in the Kansas Constitution to the effect that persons charged with the exercise of powers properly belonging to the one shall not exercise any functions pertaining to either of the others. Yet this court, in the case of *In re* Sims, Petitioner, 54 Kan., 1, has said:

'We think, however, that under our constitution these powers are as clearly separated as though the framers of the constitution had said so in terms.'

Mr. Chief Justice Kingman emphasized this by saying that to confer both executive and judicial powers upon a court, is 'as dangerous to good government as it is subversive of the constitution which has carefully kept separate the executive, legislative and judicial departments of the government, 'to the end that it may be a government of laws, and not of men.' (*Auditor of State* v. *A. T. & S. F. Railroad Co.*, 6 Kan., 505.) In another place he said that it is absurd to claim that it is in the power of the legislature to give a court authority to review acts which are purely executive in

their character. In *Coleman* v. *Newby*, 7 Kan., 82, Mr. Justice Valentine discussed the separation of the sovereign powers, and insisted that they must be independently maintained, and power exercised only by the particular department to which it has been delegated. He held that the power to make rules for the District Court could not be conferred upon the Supreme Court, for the reason that it was a legislative function which belonged to the legislature, and could not be exercised by the judicial department. He stated that the prescribing of rules by which human conduct shall be governed in the future is a legislative power, and that 'to declare what the law is or was belongs to the judiciary, but to declare what it shall be in the future belongs to the legislative.' If the making of rules by the Supreme Court for one of the inferior courts violated the constitutional limitation, certainly the making of general rules and a schedule of rates governing the future conduct of persons and corporations cannot be conferred on a court or judicial tribunal.

Again, in *In re* Davis, 58 Kan., 368, 372, Mr. Justice Allen said:

'It is not asserted that the constitution does not make a valid and effectual division of the powers of government into executive, legislative and judicial departments, nor is the wisdom of such a division of powers questioned; nor has there been any suggestion in the brief or oral argument that such a division is unreasonable or illogical. It has been generally, if not universally, accepted as the best and safest division of powers yet devised by man, and is recognized as firmly established by all writers on the constitution. * * * The legislature enacts general rules for the guidance of all departments of the government. It levies taxes and

directs the expenditures of the money raised thereby, but it executes no law. The judiciary declares the law, and directs as to its application to controversies that arise. * * * The fundamental law embodied in the constitution binds all departments of the government, and fixes the limits of their powers. To its mandates all must yield obedience —for it is superior to any and all agencies created under it.'

All writers on constitutional law are agreed that the functions of the three departments should be kept as distinct and separate as possible, except so far as the action of one is made to constitute a restraint upon the action of the other to keep them within proper bounds, and to prevent hasty and improvident action. (Cooley, Const. Lim., 6th Ed., 46)."

The Supreme Court, in the case of *State* v. *Johnson*, cited *supra*, expressly approves the decision of this court in the case of *A. T. & S. F. Ry. Co.* v. *D. & N. O. Ry. Co.*, 110 U. S., 682—wherein it was said that:

> "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law or usage, but it cannot create the obligation."

And thereon uses the following unmistakable language:

> "This tribunal possesses the extraordinary power of proclaiming in its decrees in a suit, in the

name of the state (which is not interested as shipper) against the railroad company schedules which are made conclusive in the future; and any future controversy which might arise between the shipper and the railroad company has thus been prejudged and determined. Here is found a combination of the legislative and judicial functions—the legislative power of fixing a schedule of maximum rates in respect to services to be rendered in the future by the railroad company to a private shipper, and the judicial power by which a rule for the first time promulgated by that court as to what shall be reasonable rates, by decree and execution thereof is enforced upon the railroad company, so that when a controversy does actually arise between a shipper and a railroad company as to whether a charge for the service performed be reasonable or not, such controversy has been prejudged and settled, not in an action between the parties themselves, but in a proceeding in which the state has undertaken to prejudge and determine this question, and settle the rule of conduct to be binding upon the railroad company as to future controversies with private persons.

In the usual process of making laws and providing for their enforcement, there is an interim between their enactment and their execution, affording opportunity for thought and preparation by persons affected. Here no time is lost. When a freight rate is established by this court it goes forth with judicial sanction of reasonableness stamped upon it, and, by a chancery decree, a fixed rate is promulgated and simultaneously its fairness judicially determined. Thus the victim first learns of the existence of a law reading a decree enacting it, in which he is condemned for its infraction. In

Nebraska Telephone Co. v. *State*, 55 Neb., 637, the following pertinent language was used:

'Fixing the compensation which public service corporations may charge for services to be rendered by them is legislating. It is law-making. The power of the courts is limited to declaring what the law is, and they are precluded by the constitution from performing legislative functions; and though the courts of the land have from time to time declared laws fixing the compensation which public service corporations might charge for services to be rendered by them void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation."

And concludes the opinion with:

"Where one department of government, however, having functions peculiar to itself, attempts to augment its power or extend its prescribed and legitimate sphere of operations beyond the boundaries marked out by the constitution, we cannot shrink from the duty of defining those limits, and obstructing such encroachment in a proper case, according to our best understanding, in the light thrown upon the question by statesmen, judges and lawyers who have considered, spoken and written upon the subject of constitutional limitations of power. Despotism begins when the executive, legislative and judicial departments of government

> cease to be independent of one another, and the tyrant exercises without check the powers of the three united."

Almost from the date of its organization the Supreme Court of Kansas has adhered to the doctrine that, under the constitution of that state, the courts can exercise no legislative or administrative function. They are vested with only judicial power. The legislative power is vested in a house of representatives and senate. In construing the powers and functions of the co-ordinate branches of the state government, that court said, in the case of *State* v. *Johnson*, cited *supra*, that "prescribing of rules by which human conduct shall be governed in the future is a legislative power;" that "to declare what the law is or was belongs to the judiciary, but to declare what it shall be in the future belongs to the legislature;" and held that "it is a cardinal principle of representative government that the making of laws, and rules regulating the future conduct, and fixing the rights of parties belongs to the legislative department—a power which can never be reposed in or *exercised* by the judiciary." That decision approved and followed the decision of the United States Circuit Court in the case of *Western Union Co.* v. *Wyatt*, 98 Fed., 340, 359, in which that court, construing the constitution of Kansas, held that it would not be due process of law, under the federal constitution, for a legislative or administrative tribunal to exercise a judicial function, or for a judicial tribunal to exercise

a legislative or administrative function; and each of these courts decided that the law of Kansas creating the Court of Visitation was void, and its orders and mandates nugatory, because the legislature had delegated to the court, and vested in it, judicial, legislative and administrative functions.

The federal court, on application of the Western Union Telegraph Company, perpetually enjoined the enforcement of orders of the Court of Visitation, because the commingling of the functions of the three co-ordinate branches of the government in a judicial tribunal was a violation of the guarantees of our representative form of government, and did not afford that "due process of law," or that "equal protection of the law," vouchsafed by the constitution of the United States, and in each case it was held that, under the constitution, the legislature had no power to delegate to or vest in a judicial tribunal these commingled powers and functions.

In the case of *Western Union Co.* v. *Wyatt, supra,* the language and argument of the learned judge is most pertinent here. He says:

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. * * * In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the pub-

lic, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. * * * Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. *Reagan* v. *Trust Co.,* 154 U. S., 362; *Smyth* v. *Ames,* 169 U. S., 466. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi-public* service, because that is a legislative prerogative, and that the legislature has not power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different. * * *

In *Ry. Co.* v. *Gill,* 156 U. S., 649, it was also said that: 'It is not the province of courts to enter

upon the merely administrative duty of framing a tariff of rates for carriage.'

In referring to the question whether rates established by the legislature prevent a fair and reasonable return for the employment of capital in a legitimate enterprise, it was said by Foster, J., in *Cotting* v. *Stock Yards Co.*, (C. C.) 82 Fed., 845:

'It should not be assumed that courts, in deciding this constitutional question, can undertake to fix rates, but merely to decide whether the rates prescribed by the law are in violation of the complainant's constitutional rights.'

Judge Thayer, in the same case, said that: 'The judiciary have no power to prescribe a schedule of maximum rates.' (C. C.) 82 Fed., 856.

In the Express cases, 117 U. S., 1, 29, the court, in speaking of the action of the trial court in fixing and regulating the terms upon which the railroad company and the express company should do business, said:

'In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves. * * The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power we do not doubt.' * * *

In *Ry. Co.* v. *Wellman*, 143 U. S., 339, 344, 402, the court said that: 'The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.'

In *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S., 499, Mr. Justice Brewer, in delivering the opinion of the court, said:

> 'It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.' "

Thus it will be seen that the highest judicial tribunal of the state has uniformly construed the constitution of the state to prohibit the exercise by the judiciary of any legislative or administrative power or function, and that the legislature cannot lawfully vest in the courts any such power or function. If, therefore, the legislature cannot lawfully delegate to the courts legislative or administrative functions, and has not attempted to do so, the exercise by the courts of such a function would be a mere usurpation of power, and its orders and judgments in no sense "due process of law."

In the case of *Pennsylvania* v. *Wheeling*, 18 How. (U. S.), 440, this court said:

> "The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws."

In the *Sinking Fund Cases*, 99 U. S., 761, this court said:

> "The distinction between a judicial and a legislative act is well defined. The one determines what

the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in the future cases arising under it."

In the case of *U. S.* v. *Macon Co.*, 99 U. S., 591, this court said:

"We cannot create new rights, or confer new powers. All we can do is to bring existing powers into operation."

In *re The Lollawaune*, 21 Wall., 576, the court said:

"We must always remember that the court cannot make the law. It can only declare it."

In *re Calhoun Co.* v. *Galbraith*, 99 U. S., 219, it was said that:

"Our duty is to execute the law; not to make it."

Now let us apply the principle of law so firmly settled by the Supreme Court of Kansas and this court to the order of the state court sought to be reviewed in this proceeding. The alternative writ of mandamus reads as follows:

"*The State of Kansas to the Defendant, The Missouri Pacific Railway Company, Greeting*:

"WHEREAS, It has been represented to the Supreme Court of the State of Kansas, by an affidavit on the part of the plaintiff in above entitled action, that the plaintiff, a co-partnership composed of F. D. Larabee and F. S. Larabee, has been engaged in owning and operating a mill and elevators, and in the purchase, sale and shipment of grain, flour

and feed stuffs, in connection therewith, for several years last past, at the City of Stafford, in the County of Stafford, in the State of Kansas, and that its mill and elevators are situated upon the tracks of the defendant company, a railway corporation, and that there is a transfer track built from a connection with the tracks of the Atchison, Topeka & Santa Fe Railway Company to a connection with the tracks of the defendant at its station in said City of Stafford and that for three years last past the defendant has continuously, until the 29th day of August, 1906, by its engines, taken and transferred cars, loaded and unloaded, from said transfer track and from the Atchison, Topeka & Santa Fe Railway Company, and delivered them to the plaintiff at its mill and elevators, and upon request of the plaintiff to return such cars, loaded and unloaded, over said transfer track again into the possession of the said Atchison, Topeka & Santa Fe Railway Company, and that the defendant charged for such transfer service of receiving and returning said cars the sum or price of two dollars per car, and that on the 29th day of August, 1906, the defendant refused to further make any transfer of cars over said transfer track, without reasonable excuse therefor; that the plaintiff at all times had promptly paid for such service; that it had extended its business over the line of the Atchison, Topeka & Santa Fe Railway Company, and that said transfer track is the only practicable means of receiving or sending cars, or receiving or sending shipments of grain, flour and mill stuffs, from or to customers on the line of the Atchison, Topeka & Santa Fe Railway Company, and that the refusal of the defendant to continue to transfer cars over such transfer track is to the serious damage and loss of the plaintiff in the transac-

tion of its daily and constant business at its mill and elevators, and it is further so represented that the defendant owes the duty to the plaintiff to transfer cars over said transfer track to and from a connection with its mill and elevators, and to and from the Atchison, Topeka & Santa Fe Railway.

And it has been further so represented that the traffic in grain handled by the defendant at its station at the said City of Stafford has for several years last past exceeded over one hundred cars of grain each calendar year shipped and transported over its track at said station; that it has at said station a track or car scales of sufficient capacity for weighing grain in car load lots and in the car; that the defendant has at all times refused to weigh any and all cars of grain transported by it for the plaintiff, and has at all times compelled the plaintiff to accept bills of lading on every car of grain shipped over its line, in which is stated that the defendant was not liable for damage or shortage thereto, and refuses to issue to the plaintiff bills of lading on any other condition or terms whatever. And it is further represented that the defendant owes the duty to the plaintiff to receive its shipments of grain in car load lots without exacting from the plaintiff that it will not be responsible for loss or damage in the carrying of the same, and that such exactions are in violation of law, and that as to each of the foregoing matters the plaintiff has no plain, speedy or adequate remedy at law.

Now, therefore, being desirous that justice may be done in the premises, you, The Missouri Pacific Railway Company, the defendant herein, are hereby commanded that you immediately restore, resume and make transfer of cars, loaded and unloaded, to and from the line of the Atchison, Topeka &

Santa Fe Railway Company, and to and from its mill and elevators at the station and City of Stafford, in the County of Stafford and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor, and that you at once and without delay issue upon all shipments of grain by the plaintiff in car load lots from its mill and elevators at said station, without the condition in the bills of lading therefor, that it is not responsible for loss or damage therefor.

Or, if you have any just or valid excuse for not so doing, that you do, on or before the 21st day of September, 1906, show cause why the writ of peremptory mandamus should not be allowed; and that you then and there return this writ with your answer thereto, that you have done the things herein commanded, or therein show cause why you have not done so.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, and the seal of said court, attested by the clerk of said court at the City of Topeka, this 15th day of September, 1906.

(Seal) D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

On presentation of the affidavit for the writ of mandamus, and on the application of the plaintiff, this alternative writ of mandamus is allowed, this 15th day of September, 1906.

W. A. JOHNSTON,
Justice of the Supreme Court of the State of Kansas."

Under the Statute of Kansas, no other pleadings are allowed than the writ and answer.

Again, we invite the attention of the court to the issues made by the pleadings (The Writ). No statutory duty is alleged. It is not claimed that any contractual relations existed between the Mill Company and the Missouri Pacific Railway Company. The Atchison, Topeka & Santa Fe Railway Company is not a party to the record. It is not pretended that the customary rate per car had been fixed by any legislative or administrative tribunal, or by contract. Nor is it claimed that there was or had existed any discrimination, or that the Mill Company had been misled or deceived by the Railway Company. The order and judgment of the court commands the Missouri Pacific Railway Company "to immediately restore, resume and make transfer of cars, loaded and unloaded, from the line of the Atchison, Topeka & Santa Fe Railway Company, and to and from its mill and elevators at the station and City of Stafford, in the County of Stafford and State of Kansas, upon the request and demand of the plaintiff, *and upon the payment of the heretofore customary charges therefor.*" It is found as a fact (Finding Fifth, Rec. pp. 33-34), that, for transferring cars to and from the Santa Fe tracks, The Missouri Pacific Railway Company had *charged the Atchison, Topeka & Santa Fe Railway Company two dollars per car, which was paid by the Santa Fe*

to the Missouri Pacific Railway Company, but *never* by the Mill Company.

The fourth and fifth findings of fact are as follows, viz:

> "The lines of the Missouri Pacific and Santa Fe intersect at a point one mile distance westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection the Santa Fe in the year 1903, constructed, at its own expense, a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line is located in Prairie Avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, or on its right-of-way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use, the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right-of-way, both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right-of-way over which it passes."
>
> "Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars to be by the Missouri Pacific taken there-

from and placed for loading with flour at the Mill Company's mill, or at such convenient position as to enable the Mill Company, with its own force, to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track, and place them for loading with flour at the mill, or in such position as to enable the Mill Company, with its own force, to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe, it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill, and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; the Santa Fe would take the cars, bill them to destination, collect all freight and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue bill of lading, way bill, or receipt, or present or collect bills for freight or switching charges."

The order and judgment of the court is as follows (Rec. p. 30):

"JOURNAL ENTRY OF JUDGMENT.

This cause comes on for decision, and thereupon it is ordered and adjudged that the peremptory writ of mandamus prayed for by the plaintiff be allowed, and that judgment herein be entered against

> the defendant, and that the peremptory writ of mandamus be issued to the defendant, commanding it to immediately restore, resume and make transfer of cars, loaded and unloaded, from the line of the A. T. & S. F. Rly. Co., and to and from its mill and elevator at the station and City of Stafford, in the County of Stafford and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor. * * *
>
> It is further ordered that the defendant pay the costs of this proceeding, taxed at $....., and hereof let execution issue."

Is this order and judgment, or any part of it, the exercise of a judicial function? The lamented Colonel Rossington, in the brief which he filed in this cause, calls it a "regulatory" order, or the exercise of the "regulatory power of the state." We think it must be conceded that the "regulating power of the state" must first manifest itself through legislative, and not judicial channels.

By this order and judgment, the court has "made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves."

The order and mandate of the court irrevocably fixes for all time to come an arrangement between the Santa Fe Company and the Missouri Pacific Company, for the benefit of the Mill Company, whereby the Missouri Pacific Company is compelled to perform a service for the Santa Fe Company, on the tracks and right-of-way of

the latter company, and "immediately restore, resume and make transfer of cars, loaded and unloaded, from the line of the A. T. & S. F. Company, and to and from its mill and elevator at the station and City of Stafford, in the County of Stafford, and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor."

If this sweeping order and mandate does not deny to the Missouri Pacific Company the equal protection of the law and deprive it of its property without due process of law, in violation of the Federal Constitution, it is difficult to conceive of an order that would. The principle announced by this court in the case of *Mo. Pac.* v. *Nebraska*, 164 U. S., 414-416, is controlling here. The findings of fact (No. 5, Trans, p. 20), disclose that the customary charge made by the Missouri Pacific Company to the Santa Fe was two dollars per car. Because of that custom, the court finds it to be the legal duty of the Missouri Pacific Company never to change, vary or modify the charge, but, upon the "request and demand of the plaintiff," it must continue to perform the service for the Santa Fe Company, "upon the payment of the heretofore customary charges therefor."

Conditions may change. The prices of steel, labor, equipment, may advance to such an extent as to make the "heretofore customary charges" confiscatory, but the order and judgment of the court is *res judicata*, and from

its operation and effect the Railway Company can get no relief, unless granted by this court. The order and judgment is distinctively a legislative act, and in no sense judicial. It fixes a rate which a common carrier shall charge for service performed by it, and gives the carrier no future discretion in the premises. It deprives the Missouri Pacific Company of the right to make another or different "arrangement" with the Santa Fe Company. The order of the court creates an obligation on the part of the Missouri Pacific Company to perform a service for the Santa Fe Company, upon the demand of the Mill Company, which is not binding upon, nor can it be enforced against, the Santa Fe Company, for it is not a party to the proceeding.

> *Central Stock, etc.* v. *Ry. Co.,* 192 U. S., 570-571.

It in effect makes a contract between the two railroad companies binding only upon one. It was said by this court (192 U. S., 571):

> "The courts have no authority to dictate a contract to the defendant, or require it to make one."

In the case of *Little Rock, etc. Co.* v. *St. L. I. M. & S. Ry. Co.,* 41 Fed., 563, it was said by the court, that:

> "The common law imposes no obligation on railroad companies to enter into such contracts. 'At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if

he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ.' *A. T. & S. F. Co.* v. *Denver & N. O. R. Co.*, 110 U. S., 667-680, 4 Sup. Ct. Rep., 185. Making contracts for parties 'is not within the scope of judicial power.' Express Cases, 117 U. S., 1-26, 6 Sup. Ct. Rep., 542-628. In the case last cited the court, speaking of the decree of the court below fixing and regulating the terms upon which the railroad company and the express company should do business, said: 'In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that we said in *A. T. & S. F. Co.* v. *D. & N. O. R. Co.*, 110 U. S., 667, 4 Sup. Ct. Rep., 185, followed at this term in *Pullman Palace Car Co.* v. *Mo. Pac. Ry. Co.*, 115 U. S., 587, 6 Sup. Ct. Rep., 194, could not be done. The regulation of matters of this kind is legislative in its character; not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt.' 117 U. S., 29, 6 Sup. Ct. Rept., 556."

In the case of *Little Rock, etc., Co.* v. *St. L. S. W. Ry. Co.*, 63 Fed., 779, it was said that:

"It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic

that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable, and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right, before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated."

Central Stock Yards v. *L. N. R. R. Co.*, 192 U. S., 570-571.

And again it was said (110 U. S., 681) that a carrier "may select his own agencies, and his own associates, for doing his own work."

Not so in Kansas, however, if the decision of the court below remains the law. The order of the court makes a unilateral contract or arrangement. It certainly lacks the semblance of mutuality. It has the virtue of

perpetuity so far only as the Missouri Pacific Company is concerned. The operation of the terminals at Stafford, and one mile of its main track, by the order of the court, is practically turned over to the Mill Company. All of its business as a common carrier at Stafford is subordinated to "the request and demand of the plaintiff, upon the payment of the heretofore customary charge." It is found as a fact (Findings 14 and 15, Trans. pp. 36-37) that "an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested wheat crop then ready for market," and that the switching service had been performed by the engine and crew engaged in moving the wheat crop, and that the "crowded condition of the business on the Missouri Pacific during that period, and the general character of its motive power and train crew were well known to its agent, as well as to the Santa Fe and to the Mill Company."

Notwithstanding all this, and that there might be a recurrence of these conditions, the Railway Company, under the order of the court, is left with no discretion, but must continue to perform the service *for the Santa Fe,* "upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor." If this is due process of law, or the equal protection of the law, we have been unable to find any principle of law which sustains, or, by analogy, approves it.

Again, if there are other industries at Stafford on

the line of the Missouri Pacific, the "heretofore customary charges" must be applied to them; otherwise they would become "disfavored shippers," because the Supreme Court of Kansas has determined that the "heretofore customary charges" are the *only* charges which must prevail. The "heretofore customary charges," so far as the Missouri Pacific Company is concerned, cannot be changed by the carrier; cannot be changed by the legislature; cannot be changed by the Kansas Railroad Commission, or by the Interstate Commerce Commission, because the Supreme Court of Kansas has issued its irrevocable order and mandate that the Missouri Pacific Company shall forever continue to perform this service for the Santa Fe, upon the "request and demand of the plaintiff, and upon the payment of the *heretofore* customary charges therefor."

This most extraordinary order was made by the state court notwithstanding its oft repeated announcement that it was a "cardinal principle of representative government that the making of laws and rules regulating the future conduct and fixing the rights of parties belong to the legislative department—*a power which can never be reposed in or exercised by the judiciary.*" (61 Kan., 820.) No matter how disastrous to the Missouri Pacific Railway Company the "arrangement" made by the court may be, it must forever continue to go off of its own rails, and right-of-way, and perform a service for its

competitor, the Atchison, Topeka & Santa Fe Railway Company, whenever requested and demanded by the *Mills Company*, upon the payment of the *heretofore* customary charges therefor. Such cannot be the law.

A. T. & S. F. Ry. Co. v. *D. & N. O.*, 110 U. S., 667;
Northern Pac. Ry. Co. v. *Dustin*, 142 U. S., 498;
McNeil v. *Southern Ry. Co.*, 202 U. S., 543.

REQUIRING THE RAILWAY COMPANY TO RESTORE AND RESUME THE SERVICE, "UPON THE PAYMENT OF THE HERTOFORE CUSTOMARY CHARGES THEREFOR," WAS THE EXERCISE OF A LEGISLATIVE, AND NOT A JUDICIAL FUNCTION.

The power to make rates is unquestionably a legislative function, as has been many times decided by this court.

Munn v. *Illinois*, 94 U. S., 113-114;
Peik v. *R. R. Co.*, 94 U. S., 164-168;
R. R. Co. v. *Exp. Co.*, 117 U. S., 1;
R. R. Co. v. *Minn.*, 134 U. S., 418;
Reagan v. *Farmers L. & T. Co.*, 154 U. S., 418;
Reagan v. *Farmers L. & T.*, 154 U. S., 362;
R. R. Co. v. *Gill*, 156 U. S., 649;
R. R. Co. v. *T. C. C.*, 162 U. S., 184;
I. C. C. v. *R. R. Co.*, 167 U. S., 479;
I C. C. v. *R. R. Co.*, 168 U. S., 144.

The court below, in decreeing permanency to the "heretofore customary charges" of the carrier performing a given service, thereby fixed the two dollar per car charge as the rate. By its action, it usurped the legislative power of the state, if the service was purely local. If interstate, it usurped the powers of the Interstate Commerce Commission. By the order and mandate, the State of Kansas has denied to the Railway Company the equal protection of the law. "A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, denies or takes away the equal protection of the law, violates the constitutional inhibition; and as he acts in the name of the state, and is clothed with the state's power, his act is that of the state." (*Ex parte Virginia*, 100 U. S., 347.)

The Santa Fe, the Union Pacific, and all other railroad companies operating in Kansas except the Missouri Pacific Company, may, under the constitution and laws of that state, adjust, fix, change and vary their charges for services performed as common carriers, and "may select their own agencies and their own business associates for doing their own work," and may confine their

operations to their own rails, tracks and right-of-way. Not so with the Missouri Pacific Company. The State of Kansas—through its constituted agency, the Supreme Court—denies to it the "equal protection of the law," by requiring it to go on to the rails and track and right-of-way of the Santa Fe Company, and perform a service for that company, upon the "request and demand" of a private individual, upon the "payment of the heretofore customary charges therefor." Nay, more. Regardless of the compensatory character of the charges, and without providing a tribunal to which it may appeal for relief, it must continue to obey the mandate of the state so long as such private individual may demand it. The legislature of the state, when controlled by the wildest vagaries of Populism, never placed upon the statute book a law so unjust and so violative of constitutional guarantees as this order and mandate of the court. The equal protection of the law guaranteed by the Constitution forbids a state "to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated."

Ry. Co. v. *Mathews*, 174 U. S., 104.

The language of this court in the case of *Yick Wo* v. *Hopkins*, 118 U. S., 373, is peculiarly applicable to the facts of this case, as disclosed by the record. The court, speaking of certain ordinances and their enforcement, said:

> "Whatever may have been the intent of the ordinances adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

There was no duty enjoined by the common law, or prescribed by any statute of Kansas, which required the Railway Company to perform such a service, for a minimum or maximum charge therefor, and the order and mandate of the court should be held to be a mere usurpation of power, and therefore void, as being in violation of the "due process" clause of the Federal Constitution.

As clearly shown by the pleadings and the findings of fact, the "heretofore customary charges" had not been fixed by any statute of Kansas, or by any order of any administrative board, or by contract. Not only does the court order a restoration of the service, but, by a judicial decree, fixes the compensation.

The court, in the case of *State* v. *Johnson*, 61 Kan., 829, among other things, declares that:

> "When a freight rate is established by this court, it goes forth with judicial sanction of reasonableness stamped upon it, and, by a chancery decree, a fixed rate is promulgated, and simultaneously its fairness is judicially determined."

And the court cites with approval the case of *Nebraska Tel. Co.* v. *State*, 55 Neb., 637, and the language used, viz.:

> "Fixing the compensation which public service corporations may charge for services to be rendered by them is legislating. It is law-making. The power of the courts is limited to declaring what the law is, and they are precluded by the Constitution from performing legislative functions; and though the courts of the land have from time to time declared laws fixing the compensation which public-service corporations might charge for services to be rendered by them void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation."

Thereupon the court concludes that:

> "It is one thing to determine whether a freight rate is reasonable in a controversy between a shipper and a carrier, and another thing to decide, at the

suit of the state or a private party, what shall be charged in the future for such services. A decision made in the first case might be a precedent when a similar controversy subsequently arose; but the promulgation of the first decision, however formally done by a judicial tribunal, could not have the far-reaching effect of a legislative act, for it is peculiarly within the province of the legislature to regulate future conduct. Chief Justice Marshall said:

'The legislature makes, the executive executes, and the judiciary construes the law.' (*Waymon* v. *Southard,* 10 Wheat. 1, 6 L. Ed., 253.)

In the Sinking Fund Cases, 99 U. S., 700, 25 L. Ed., 516, Mr. Justice Field said:

'The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.'

In Norwalk Street Ry. Co.'s Appeal, 69 Conn., 594, 37 Atl., 1086, Justice Hammersley used this language:

'One controlling consideration in deciding whether a particular act oversteps the limits of judicial power, is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments.' A main purpose of the division of powers between legislature and judicature is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil

liberty, and is forbidden by the Constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition.'

Judge Cooley, in his Constitutional Limitations, page 108, notes the distinction between legislative and judicial power, and says:

'The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law.' And it is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions.' "

State v. *Ry. Co.*, 76 Kan., 474.

In the decision cited, and many others which might be referred to, the Supreme Court of Kansas has construed the constitution of that state as expressly prohibiting the delegation of legislative or administrative power to the courts, and as prohibiting the exercise by the courts of any but judicial functions.

If this order shall stand unreversed by this court, the Missouri Pacific Railway Company is powerless to change or modify it if the Mill Company insists upon compliance with it. The legislature has no power to change or modify a judicial decree. Other railway companies, competitors of the Missouri Pacific Company, may put into effect different charges for the same service, but, as between that company and the Mill Com-

pany, the "heretofore customary charges" must prevail, because this is the mandate of the highest judicial tribunal of the state.

This order, on the face of it, is an attempt to regulate the *future* conduct of the Missouri Pacific Railway Company—not only in the movement of cars upon the demand of the Mill Company, but in the payment of the "heretofore customary charges,"—thereby fixing the rates to be charged in the future, and for all time to come, without legislative authority therefor.

Counsel, in their brief, frankly admit that the order is one of regulation, and their argument is largely based upon the contention that the order of the court is but the exercise of the "regulatory power of the state." Therefore, it being a mere order of regulation—and I think this cannot be successfully questioned,—does it not follow that this is a legislative, and not a judicial function, and the court without power or jurisdiction to make it?

In re Wisconsin, etc., v. *Jacobson*, 179 U. S., 296—relied upon so much by counsel for the Mill Company—this court said:

> "At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind."

There being no legislative authority as a basis for the judgment, is it not void? Under this order and judgment, the "heretofore customary charges" are not simply

advisory, or merely *prima facie*, equal and reasonable, but final and conclusive as to what are equal and reasonable charges. In other words, the court, by judicial decree, has fixed the "heretofore customary charges" as the permanent rate, independent of whether such rate is equal and reasonable, without that question being an issue.

C. B. & Q. Ry. Co. v. *Minnesota,* 134 U. S., 456.

The case of *T. & P. Ry.* v. *Abilene, etc.*, 204 U. S., 437-442, is directly in point.

THE ORDER AND MANDATE OF THE STATE COURT BEING THE EXERCISE OF A LEGISLATIVE, AND NOT A JUDICIAL FUNCTION, IS IT DUE PROCESS OF LAW, AND WOULD NOT ITS ENFORCEMENT DENY TO THE RAILWAY COMPANY THE EQUAL PROTECTION OF THE LAW?

Section 1 of the Fourteenth Amendment ordains:

> "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Congress is given power "to enforce" its provisions "by appropriate legislation." It has enacted "appropriate

legislation," under which the courts enforce the rights secured by this section. In *Chicago & Burlington Railroad Co.* v. *Chicago,* 166 U. S., 226, 233, it is said:

> "It must be observed that the prohibitions of the amendment refer to all instrumentalities of the state—to its legislative, executive and judicial authorities, and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with state power, his act is that of the state. This must be so, or, as we have said, the prohibition has no meaning, and the state has clothed one of its agents, with power to annul or evade it. *Ex parte* Virginia, 100 U. S., 339, 25 L. Ed., 676; *Neal* v. *Delaware,* 103 U. S., 370, 26 L. Ed., 567; *Yick Wo* v. *Hopkins,* 118 U. S., 356, 6 Sup. Ct. Rep., 1064; 30 L. Ed., 220; *Scott* v. *McNeal,* 154 U. S., 34, 14 Sup. Ct. Rep., 1108, 38 L. Ed., 896."

The State of Kansas, through its lawfully constituted agency—its highest judicial tribunal—has usurped its constitutional prerogative, and promulgated a law—a rule of action—and calls it "due process of law."

In the case of *Pennoyer* v. *Neff,* 95 U. S., 714, it was said by this court that:

> "The term 'due process of law,' when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there

must be a competent tribunal to pass upon their subject matter, etc."

The validity of every judgment depends upon the jurisdiction of the court. If the state court had no jurisdiction to exercise a legislative function, the order in this case does not give to the Railway Company the fundamental guarantee of "due process of law," and has no validity.

The order and mandate of the court is not "due process of law," within the meaning of the Federal Constitution, for "to give such proceedings any validity, there must be a competent tribunal to pass upon their subject matter."

"Due process of law" means lawful judicial proceedings in a court of competent jurisdiction. The Supreme Court of Kansas (Sec. 3, Art. 3 of Const.) has "original jurisdiction in proceedings in *quo warranto*, mandamus and *habeas corpus*, etc." It is vested only with judicial power. (Sec. 1, Art. 3 of Const.) It has no legislative power, for the "legislative power of this state shall be vested in a house of representatives and senate." (Sec. 1, Art. 2 of Const.) And that court has decided, in the case of *State* v. *Johnson*, 61 Kan., 813, *supra*, that "prescribing of rules by which human conduct shall be governed in the future is a legislative power," and that "to declare what the law is or was belongs to the judiciary, but to declare what it shall be in the future be-

longs to the legislature;" that it is a "grant of judicial power to the court to determine what are reasonable freight rates for services already rendered; but as to what shall be charged in the future for such service, it is legislative in character." (61 Kan., 814-5.)

The court, in the opinion, cited *supra*, expressly approves of the doctrine of this court announced in the cases of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 362-397; *I. C. C.* v. *N. O. & T. P. R. R. Co.*, 167 U. S., 479-499; and *I. C. C.* v. *Am. M. R. Co.*, 168 U. S., 144-161, in which it was held that the making of a rate was a legislative, and not a judicial function (61 Kan., 817-818), and approved the decision of the Supreme Court of Nebraska (*Neb. Tel. Co.* v. *State*, 55 Neb., 627), in which it was "expressly held that the jurisdiction to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative, and not a judicial, function;" and also approved the decision in Norwalk St. Ry. Co. Appeal, 69 Conn., 576, in which it was said that "if the court should attempt to establish for the future a schedule of charges, it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge;" and approved the language of Judge Thayer in *Cotting* v. *Stock Yards Co.*, 82 Fed., 845, that:

> "The judiciary have no power to prescribe a schedule of maximum rates."

And the language of this court in Express Cases, 117 U. S., 1, in which it was said that: "The regulation of matters of this kind is legislative in its character—not judicial." And thereupon the court says that (61 Kan., 820):

> "The rate-making power, being essentially legislative in its nature, whether exercised directly by the legislature or delegated by it to a competent board or commission, can no more be imposed on or exercised by the judicial department than can the pardoning power of the governor, or any other distinctively executive function."

The court below, by this decision—which has not been overruled or modified—has defined its own jurisdiction, and so construed the Constitution of the State of Kansas that it has no power or jurisdiction to "determine what compensation a public service corporation may exact for services" to be rendered by it—and the construction placed upon the constitution of Kansas by the highest judicial tribunal of the state is conclusive upon this court.

Haire v. *Rice,* 204 U. S., 291.

The court has, by its own construction of the state constitution (*State* v. *Johnson,* 61 Kan., 811, *supra*), decided that the order and mandate made in this controversy was a mere usurpation of power, and therefore not "due process of law."

In the case of *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 235, it was said that:

"It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S., 542, 554 (23; 588, 592); *Leeper* v. *Texas*, 139 U. S., 462, 468 (35; 225, 227). But a state may not, by any of its agencies, disregard the prohibitions of the 14th amendment. Its judicial authorities may keep within the letter of the statute prescribing the forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the 14th amendment, has said:

'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation.' (*Davidson* v. *New Orleans*, 96 U. S., 97, 102; 24; 616, 619.)

The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirements of due process of law."

While it is true that the Supreme Court has original jurisdiction under the Constitution in mandamus, and, under the statutes (Sec. 5184, Genl. Stat. 1901, p. 1060), "the writ of mandamus may be issued by the Supreme Court * * * to any * * * corporation * * * to compel the performance of any act which the law *specially* enjoins as a duty, etc., the order and mandate of the court (Trans. p. 30), does not require the doing of any "act which the law specially enjoins as a duty, resulting from any office, trust or station." The court holds (Trans. p. 38), that "the defendant became, and, under the finding still is, a common carrier of loaded and empty freight cars to and from the transfer track, and its own station a mile away;" and then proceeds to fix a rule and regulation for the *future conduct* of the defendant, based upon no statute of the state, and not in pursuance of any order or finding of the board of railroad commissioners, or any other legislative or administrative board or tribunal—which mandate requires service as a common carrier, upon the request and demand of the Mill Company, upon "the payment of the *heretofore customary charges therefor.*"

Can there be any question but that the court, by this order, has fixed the charges to be *hereafter* made by this railway company for the services to be *hereafter* performed by it as a common carrier, upon the "request and demand of the Mill Company?" The court will probably take judicial notice that the railway company has a

schedule of rates for the transportation of grain in Kansas. Without any question or issue as to the reasonableness of such rates, would the Supreme Court of Kansas have the power to compel, by mandamus or other mandatory order, the railway company to continue to transport grain over its line for all time to come, upon "the request and demand" of any shipper, and upon the "payment of the *heretofore* customary charges therefor?" Would not such an order fix and establish a schedule of maximum rates for the transportation of grain? As between the parties to the suit or proceedings, would it not fix and establish a schedule of minimum and maximum rates? Conditions may have changed, or may hereafter change, so that the charge of two dollars per car,—the "heretofore customary charge" for such service as a common carrier—may be extravagantly high or unreasonably low, but that arbitrary rate has been immutably fixed and determined by the order of the court. Upon what theory, upon what principle of law, can it be said that such proceedings, such an order, is "due process of law," especially in view of the fact that the Supreme Court of Kansas, in construing the constitution under which it has its existence, has held that it has not the power or jurisdiction to exercise any legislative, administrative or executive function?

It may be that the legislature of Kansas, under the constitution, has the power to enact a law which would require the railway company to enter into an "arrange-

ment" with another common carrier to leave its own tracks, and right-of-way, and go on to the tracks and right-of-way of such other common carrier, and perform a service for an individual shipper at his "request and demand," upon the "payment of the *heretofore* customary charges therefor," but have the courts, especially the Supreme Court of Kansas, under its construction of its power, the right to require a railroad company to enter into such an "arrangement?"

Central Stock Co. v. *Ry. Co.*, 192 U. S., 571;
Little Rock, etc. v. *Ry. Co.*, 41 Fed., 563;
Little Rock, etc. v. *Ry. Co.*, 63 Fed., 779;
A. T. & S. F. Ry. Co. v. *R. R. Co.*, 110 U. S., 680.

Is it "due process of law" for courts to act as instruments of oppression? Is it "due process of law" for a judicial tribunal to usurp essentially legislative functions? If a judicial tribunal exercises legislative functions, has it any jurisdiction of the subject matter? The fact that a court assumes jurisdiction of a legislative function does not give to its orders and mandates the force and effect of "due process of law."

In the case of *State* v. *Johnson*, 61 Kan., 803, in construing the Constitution of the State of Kansas, that court held that legislative, judicial and administrative functions could not be "co-mingled and interwoven" without a violation of the "constitutional requirement that the three great departments of government be kept

separate, and the power and duties of each exercised independently of the other."

In the case of *West Un.* v. *Wyatt,* 98 Fed., 340-359, construing the Kansas Constitution, the court announced the same doctrine, and held that it would not be "due process of law," within the Federal Constitution, for a judicial tribunal to exercise a legislative function, any more than it would be "due process of law" for a legislative or administrative body to exercise a judicial function.

Moss v. *Whitzel,* 108 Fed., 579-582;
Kilbourne v. *Thompson,* 103 U. S., 191.

To give to the order and mandate of the court below any validity, it must have had jurisdiction "to pass upon the subject matter of the suit." (*Pennoyer* v. *Neff,* 95 U. S., 733.) The Supreme Court of Kansas is a judicial tribunal. Its powers and jurisdiction are defined by the Constitution which created it. The legislature has delegated to it no legislative or administrative function. The jurisdiction conferred in mandamus proceedings does not give it power, under the guise of such proceedings, to exercise a function prohibited by the fundamental law of its creation. Although the highest judicial tribunal in the state, an order made or judgment entered by it which is essentially legislative is not "due process of law," because made by such tribunal. The Fourteenth Amendment was intended as a shield against the usurpa-

tion of power, from whatever source it might emanate, and to secure every person "from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." (*Scott* v. *McNeal*, 154 U. S., 45.) The writ of "mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act." (*Brownsville* v. *Logue*, 129 U. S., 501.)

The court, in this case, has used the writ of mandamus to compel the railway company to do that which it was under no legal duty to do, and has prescribed rules and regulations for its future conduct, and permanently *fixed* and determined its compensation for services to be hereafter by it performed as a common carrier, and to operate its road and terminals at Stafford, Kansas, in subordination to the wishes and demands of the Mill Company, upon the "payment of the *heretofore* customary charges therefor." We submit that such order and mandate is not "due process of law."

Suppose the Santa Fe Company should now refuse to permit the Missouri Pacific Company to go on to its right-of-way, terminals and tracks. Would any court have the power to compel it, by mandamus or otherwise, to grant such permission? It is provided by Section 3, of the Amended Interstate Commerce Act, that:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; *but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*"

It is conceded that each the Santa Fe and Missouri Pacific is an interstate carrier, subject to the provisions of the Interstate Commerce Act. Notwithstanding this Act of Congress, the court has made an order which establishes and forever fixes the right of the Mill Company to demand of the Missouri Pacific Company, and made it the duty of that company, to go on to the right-of-way, tracks and terminals of the Santa Fe Company, and perform a service for the latter company, whether the Santa Fe Company demands it or not—a duty not enjoined by any state law, or created by any contract, and positively prohibited by the Act of Congress, cited, *supra.*

If the Santa Fe Company had been a party to the proceedings, would the court have had any jurisdiction or power to compel the two railroad companies to have continued the joint service upon the demand of the Mill Company? A carrier "may select his own agencies and

his own associates for doing his own work;" (110 U. S., 681), and the "courts have no authority to dictate a contract to" a carrier, "or require it to make one." (192 U. S., 571). But here the Santa Fe Company is not a party, and is in no manner concluded by the order of the court, or any part of it, and we respectfully submit that there cannot be found a precedent to sustain it, or any part of it. It is expressly stated that the action is not based upon any statutory requirement, but because the two companies, by an arrangement between themselves, having voluntarily performed the service for a time, it thereby became the legal duty of the Missouri Pacific Company to continue to perform the service upon the demand of the Mill Company, even though in doing so it committed a trespass upon the right-of-way, tracks and terminals of the Santa Fe Company. In other words, the court applies to the Missouri Pacific the doctrine of estoppel, and proceeds, by judicial decree, to usurp the exclusive functions of the legislative branch of the state government.

We contend that it does not appear from the alternative writ, the findings of fact, or the order and judgment of the court that the service sought to be restored had ever been performed by the Missouri Pacific Company *for* the Mill Company. True, the Mill Company may have been indirectly benefited, but the service, as conclusively shown by the findings of fact, were for the Santa Fe Company, to enable it to handle and control the

large business of the Mill Company—three-fifths of which was interstate. There was no privity of contract between the Mill Company and the Missouri Pacific Company—no contractual relation, express or implied. As shown by the findings, its relations were exclusively with the Santa Fe Company. It made no payment to the Missouri Pacific Company for the service. The Missouri Pacific Company made no charge against the Mill Company. As to this great volume of business in and out of the mill over the Santa Fe tracks, the Missouri Pacific Company had to do exclusively with the Santa Fe Company, under some arrangement between the two companies, to which the Mill Company was in no sense a party. It is expressly found as a fact that the charge of two dollars per car was made against the Santa Fe, and by it paid, and there is no finding that the Mill Company ever paid a cent of the so-called switching charge to either company, unless in the word "freight," as used in finding number five, is included "switching charges."

Counsel will contend that the service performed by the Missouri Pacific Railway Company *for* the Santa Fe Railway Company was a mere local service, and that the Mill Company had a vested right in its continuance.

UPON WHAT THEORY COULD THE MILL COMPANY SECURE A VESTED RIGHT IN AN AGENCY OR INSTRUMENTALITY EMPLOYED BY THE SANTA FE, TO ENABLE IT TO HANDLE THE BUSINESS OF THE MILL COMPANY?

The whole case, as disclosed by the findings of fact and the opinion of the state court, is presented upon the theory that the Mill Company looked to the Santa Fe Company to handle its business in and out, and in so doing to secure its own agencies or instrumentalities, and, because the Missouri Pacific Railway Company had for a while thus served the Santa Fe Company, it could never thereafter, over the objection of the Mill Company, sever its relations with the Santa Fe Company. It is not claimed that the Mill Company constructed its mill relying upon any promise, express or implied, of these two companies that this arrangement should be made or continued. It has not changed its pre-existing status. There is here no element of estoppel; no statutory duty or obligation is invoked or relied upon. In fact there is no foundation, in law or in fact, for the order of the state court, except that it would be very convenient for the Mill Company (and certainly very profitable for the Santa Fe Company to pay two dollars per car for the business of the Mill Company) to perpetuate the arrangement.

SECOND PROPOSITION.

THE STATE COURT ATTEMPTS TO JUSTIFY ITS ORDER UPON FINDINGS EIGHT AND NINE, AND NONE OTHER, BUT WE CONTEND THAT SUCH FINDINGS, IF AT ALL CONTROLLING, ARE ABSOLUTE NULLITIES, UNDER THE KANSAS CODE, AND THE DECISIONS OF THAT COURT CONSTRUING IT.

Under the Kansas Code, in mandamus actions, no other pleadings are allowed than the writ and answer, and the State Supreme Court, in construing that section, has said, in the case of *State* v. *County,* 11 Kan., 69, that:

> "Issues are now made up by the writ and the return. A trial may be had on such issues and judgment rendered for the plaintiff or for the defendant, the same as in other civil actions, etc."

To the same effect is the case of *Crans* v. *Francis,* 24 Kansas, 754.

In the case of *Brookover* v. *Esterly,* 12 Kan., 152-153, it was said:

> "Issues in a case are always made up by the pleadings, * * * and the findings in a case, whether by the court, jury or referee, must always be founded upon the issues. * * * Every finding of fact by the court not founded upon any issue made by the pleadings is a nullity, etc."

Again, in the case of *Newby* v. *Myers,* 44 Kan., 477, it was said that:

> "The findings of fact of a trial court must be

upon the issue or issues made in the pleadings, and every finding of fact not founded upon any issue is a nullity. Findings of fact which are not in issue by the pleadings may be wholly disregarded and treated as immaterial."

In the case of *Gille* v. *Emmons*, 58 Kan., 118, it was said that:

"A judgment entirely outside the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity."

And the court quotes with approval the decision of this court in the case of *Reynolds* v. *Stockton*, 140 U. S., 254, where it was held that, in order to give a judgment rendered by even a court of general jurisdiction the merit and finality of an adjudication between the parties, it must be responsive to the issues tendered by the pleadings. In that case the court further said:

"A judgment rendered upon another and different cause of action than that stated in the complaint, or submitted to the court for its decision, is without binding force. In that case, Mr. Justice Brewer used the following language:

'We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or to the effect of any amendment made under such power, for no amendment was made or asked. And, without amendment of the pleadings, a judgment for the recovery of the possession of real estate rendered in an action whose pleadings disclosed only a claim for the possession of personal property, cannot be sustained, although per-

sonal service was made upon the defendant. The invalidity of a judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted.'

The same question was before the court of errors and appeals of New Jersey, and it was there held that a judgment entirely outside the issues in the record is invalid, and will be treated as a nullity even in a collateral proceeding. It was said:

'Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to the proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matters be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over these particular in-

terests, which they choose to draw in question, that a power of judicial decision arises.' *Munday* v. *Vail*, 34 N. J. L., 422.

And again:

'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.' Id. 423.

The Supreme Court of Ohio has held:

'The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached.' (*Spoors* v. *Coen*, 44 Oh. St., 497).

In treating upon this subject, Freeman, in his work on Judgments, states:

'It is essential that the jurisdiction of the court over the subject matter be called into action by some party, and in some mode recognized by law. A court does not have the power to render judgment in favor of one as plaintiff if he has never commenced any action or proceeding calling for its action; nor has it, as a general rule, power to give judgment respecting a matter not submitted to it for decision, though such judgment is pronounced in an action involving other matters which have been submitted to it for decision, and over which it has jurisdiction.' 1 Freeman on Judgments, 4th Ed., Secs. 120, 120c.

See also *Little* v. *Evans*, 41 Kan., 578; *Fithian* v. *Monks*, 43 Mo., 502; *Steele* v. *Palmer*, 41 Miss., 88; *Armstrong* v. *Barton*, 42 Id., 506; *Lewis* v. *Smith*, 9 N. Y., 502; *Unfried* v. *Heberer*, 63 Ind., 67; *Dunlap* v. *Sutherlin*, 63 Tex., 38; 1 Black on Judgments, Sec. 242."

And many other decisions of the state court and of this court might be referred to in affirmance of this proposition.

Examine, if you please, as critically as you may, the application for the writ, and the alternative writ, and you will find no pretended right of the mill company based upon any alleged discrimination against it by the defendant; no issue made by the pleadings to which findings eight and nine are responsive—and not a word to justify the state court in its opinion, referring to the Mill Company as a "disfavored shipper". Nay more—the findings of fact affirmatively show that, so far as this transfer track was concerned, the relation of "shipper and carrier" had never existed between the mill company and the Missouri Pacific Railway Company.

Suppose such an issue had been tendered by the pleadings. When it conclusively appeared, as it does appear, by the findings that the discontinued service sought to be restored had never been performed *for* the mill company; that the railway company had never made any charge against the mill company; that the mill company had never paid or offered to pay to it any compensation for such service; that the previous dealings of the mill company as to all shipments in and out over the Santa Fe were with that company, and not with the Missouri Pacific Railway Company, and that the service discontinued had been performed for and at the request of, and paid

for by, the Santa Fe Company—how can it be said that the discontinuance of that service made the mill company a "disfavored shipper?"

Northern Pac. R. R. Co. v. *Washington,* 142 U. S., 498;
L. & N. R. R. Co. v. *West Coast,* 198 U. S., 483;
Donovan et al v. *Penn Co.,* 199 U. S., 279.

In the case of *U. S.* v. *N. & W. Ry. Co.,* 109 Fed., 836, it was said:

> "When we consider, therefore, the pleadings and proof and the act of Congress under which this proceeding was instituted, it becomes evident that the peremptory writ of mandamus should be refused. In the first place, the gist of the whole proceeding is an unjust discrimination in favor of one shipper over another similarly situated. It is for the remedy of such a wrong that Congress, by the act in question, gave the federal courts the power of mandamus, and for such a wrong alone. There must not only be a discrimination, but it must be an unjust discrimination; and that character of discrimination must not only be pleaded, but it must be proved by the relator; otherwise the writ of mandamus will be denied him. Act Cong. March 2, 1889, (Supplemental to Interst. Com. Act, Feb. 4, 1887); *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 145 U. S., 276, 12 Sup. Ct., 844, 36 L. Ed., 699; *Interstate Commerce Commission* v. *Louisville & N. R. R. Co.,* (C. C.) 73 Fed., 409; *Harding* v. *Railroad Co.,* 1 Interst. Com. R., 104; *Perry* v. *Railroad Co.* 5 Interst. Com. R., 97; *Brewer* v. *Railroad Co., 7* Interst. Com. R., 224."
>
> *U. S.* v. *N. & W. Ry. Co.,* 138 Fed., 852.

THIRD PROPOSITION.

IS IT DUE PROCESS OF LAW TO REQUIRE THE MISSOURI PACIFIC RAILWAY COMPANY TO LEAVE ITS OWN RAILS WITH ITS ENGINES, AND GO ONTO THE RIGHT OF WAY, TRACKS AND TERMINALS OF THE SANTA FE RAILWAY COMPANY—A COMPETING CARRIER—AND PERFORM A SERVICE FOR IT, OR FOR ITS PATRONS?

We know of no statute, state or national, creating such duty or obligation. In the case of *Ry. Co.* v. *R. R. Co.*, 110 U. S., 680, it was said that:

> "At common law, a carrier is not bound to carry except on his own line, etc."

Many authorities in harmony with this are referred to in the brief. The order and mandate of the state court is not an attempt to enforce any statutory or common law duty of the defendant. It is a clear usurpation of a legislative function by a judicial tribunal.

As was said by this court in the case of *Wisconsin* v. *Jacobson*, 179 U. S., 296:

> "At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind."

Legislative authority for such an order is not invoked. On the contrary—and I repeat—the state court in its opinion emphasizes the statement that the right set

up by the mill company is not of statutory creation, and does not depend upon any statute for its enforcement.

It is doubtful if the legislature of the state would have the constitutional power to enact a law to thus regulate a railroad company, even of its own creation. Independent of the Interstate Commerce Act, to which reference will hereafter be made, is not the constitution broad enough to protect a railway company from such extraordinary laws, if enacted by the legislature in the exercise of its legislative functions? When a judicial tribunal transcends its prerogative, and makes an order manifestly of a legislative character, as was made in this case, and attempts to enforce it, is it due process of law, and does it not thereby deny the equal protection of the law?

While disclaiming any statutory authority for this order, the counsel and the state court proceed upon the theory that, the Missouri Pacific Railway Company having voluntarily left its right of way to perfom such service for the Santa Fe Company, it was thereby forever estopped from thereafter restricting its operations to its own rails and right of way.

Northern Pac. R. R. Co. v. *Washington*, 142 U. S., 498;
L. & N. R. R. Co. v. *West Coast*, 198 U. S., 279.

In the case of *Central Stock Yards Co.* v. *L. & N. R R. Co.*, 118 U. S., 133, almost the identical question was

in issue. In that case the court, among other things, said:

> "In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the interstate commerce act."

Again, in the case of *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, cited *supra*, the court said:

> "A state is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the state, where the shipment was received in another state, and is, therefore, a subject of interstate commerce."

This case was appealed to this court, and was affirmed in the case of *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 192 U. S., 568, 572, in which this court, in every particular, affirmed the judgment of the court below.

The same question was before this court in the case of *McNeill* v. *So. Ry. Co.*, 202 U. S., 558-563, in which Justice White referred to the decision of the Circuit Court of Appeals, for the Sixth Circuit, in *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 118 Fed., 113, and approved the language of the court in that case in the following words:

> "It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think

> the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

It is quite difficult, if not impossible, to differentiate the cases last cited from the case under consideration, and it is noticeable that in the McNeill case, *supra*, the court expressly stated that:

> "We do not intimate any opinion upon the question pressed at bar as to whether an order which was solely applicable to purely state business, directing a carrier to deliver property upon a private track beyond the line of the railway company, would be repugnant to the due process clause of the Constitution."

Again, if the concluding clause of Section 3 of the Interstate Commerce Act—in which it is provided that: "But this shall not be construed as requiring any such common carriers to give the use of its tracks or terminal facilities to another carrier engaged in like business"—means anything, it certainly would prohibit the Missouri Pacific Railway Company from going onto the transfer track of the Santa Fe Company without its consent, and would also as certainly deprive the state court of power to issue a mandatory order compelling the Missouri Pacific

Company to leave its own right of way and rails, and go upon the track and terminals of another company, each of them being subject to the provisions and requirements of the Interstate Commerce Act.

FOURTH PROPOSITION.

THE REFEREE FINDS (FINDING 2) THAT THE MILL COMPANY SHIPS FROM ITS MILL OVER THESE TWO ROADS SUBSTANTIALLY ITS ENTIRE PRODUCT, THREE-FIFTHS OF WHICH IS SO SHIPPED OUT OF THE STATE OF KANSAS, AND INTO OTHER STATES, ETC. THE SAME WAS INTERSTATE COMMERCE, AND BEYOND AND NOT WITHIN THE REGULATORY POWER OF THE STATE OR THE STATE COURT.

The application for the writ and the alternative writ clearly shows that the intention was to secure car service for the *entire volume* of the mill company's business in and out over the Santa Fe lines, amounting annually to one million and a half dollars. No attempt was made to separate the state and interstate business.

The referee finds that three-fifths of *this volume* of business was interstate commerce. The mill company alleges that the use of these two interstate carriers, and

their tracks, in conjunction, was necessary to get the cars into the possession of the Santa Fe Company, "to complete the journey," and that "the only means of handling, receiving or sending loaded or unloaded cars over that line was by means of a transfer thereof over such transfer tracks, etc."

The mandate of the court to the Missouri Pacific Company is to resume the service for the Santa Fe Company when demanded by the Mill Company, to the end that the Santa Fe Company might handle this *entire volume* of business over its line, three-fifths of which is conclusively shown by the findings to be interstate and alleged by the mill company to be loaded at and started from the mill in cars furnished by the Santa Fe Company, on its journey out of the state, over the Santa Fe Company's lines.

The state court says in its opinion that:

> "The switching of cars, loaded with freight afterwards transported to another state, which is purely local, which is independently contracted for, which has no relation to the contract of carriage under which the freight is removed beyond the border of the state, which has no relation to the ultimate destination of the cars, and which begins and ends before the destination of any car handled is fixed, is a mere preliminary incident to interstate commerce, and subject to state control."

And in the same opinion the court said that the Missouri Pacific Company, in performing this service *for* the

Santa Fe Company, "relied upon the implied contract of the Santa Fe to pay the value of the service preformed."

In the performance of this service for the Santa Fe Company, the Missouri Pacific Railway Company was acting as a connecting carrier, or as the agent of the Santa Fe Company. In no sense was it the agent of the Mill company, performing for it a local service. As disclosed by the admissions of the Mill Company in its application for the writ, the empty cars were furnished by the Santa Fe Company to the mill, to be there loaded, and three-fifths of all such cars so loaded were shipped from the mill out of the state. There was here no separation in fact between that which was wholly interstate and that which was wholly intra-state.

The state court and counsel rely upon the case of *Coe* v. *Errol*, 116 U. S., 517, to sustain the contention that, notwithstanding this finding of fact, the business was not interstate, and therefore subject to the control of the state court.

In the case of *Johnson* v. *S. P. Co.*, 192 U. S., 21-22, this court, referring to the case of *Coe* v. *Errol*, 116 U. S., 517, clearly distinguishes it from the facts of this case, and shows that it has no application whatever.

The state court (Rec. p. 41) refers to the case of *Central Stock Yards* v. *L. & N. R. R. Co.*, 118 Fed. Rep., 113, and attempts to distinguish it from the facts of this case. From the statement of facts of that case made by the state court, it would appear to be distin-

guishable, but the real issues in that case, and the points decided, are not correctly stated by the state court, as will appear from a most casual reading of the opinion.

This court, in the case of *McNeill* v. *Southern Ry. Co.*, 202 U. S., 562, expressly approved the principle announced in *Central Stock Yards* v. *L. & N. R. R. Co.*, 118 Fed., 113, which was affirmed by this court in *C. S. Yards* v. *L. & N. R. R. Co.*, 192 U. S., 570, in which it was said that:

> "The courts have no authority to dictate a contract to the defendant, or to require it to make one."

The prayer of the alternative writ (Rec. p. 5), and the mandate of the court, refer to cars "loaded and unloaded" "to and from" the mill, and this court, in *McNeil* v. *Southern Ry. Co.*, cited ***supra,*** said:

> "The interstate transportation of cars from another state which have not been delivered to the consignee, but remain on the track of the railway company in the condition in which they were originally brought into the state, is not completed, and they are still within the protection of the commerce clause of the constitution."

In the case of *Johnson* v. *S. P. Ry. Co.*, 196 U. S., 21-22, the court said:

> "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and, *in our judgment, it was equally so when waiting for the train to be made*

up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

The court in that case shows the distinction between "merchandise which may become an article of commerce or may not, and an *instrument* regularly used in moving interstate commerce."

The case of *Norfolk R. R. Co.* v. *Com.*, 93 Va., 749, relied upon by the state court, is i direct conflict with the decision of this court in the case of *Johnson* v. *S. P. R. R. Co.*, 196 U. S., 21-22, cited *supra*, and the case of *R. R. Co.* v. *Becker*, 32 Fed., 849, has no application, as that case had reference to the reasonableness of a charge made for certain service. If it is analogous in principle to this case, it is in conflict with the decisions of this court, *supra*, and in conflict with the decision of this court in the case of *Rhodes* v. *Iowa*, 170 U. S., 412, that moving goods shipped from one state to another, "in the station from the platform on which they are put on arrival to the freight warehouse, is a part of the interstate commerce transportation.

Confessedly, the empty cars taken from the transfer track of the Santa Fe, to be loaded with the products of the mill, to be shipped "out of the State of Kansas, and into other states," were *instruments* of interstate commerce, within the meaning of *Johnson* v. *Ry. Co., supra*. Application for such cars was made by the Mill company to the Santa Fe Company, and not to the Missouri Pa-

cific Company, and "three-fifths" of them, when loaded, were shipped from the "mill *over these two roads,*" "out of the State of Kansas, and into other states," and the two dollars per car due the Missouri Pacific Railway Company was absorbed and paid by the Santa Fe Company, and added to the cost of transportation paid by the consignor or consignee.

When it is found, *as a fact*, that three-fifths of the business of the Mill company was interstate, what power or jurisdiction did the state court have to control the movement of *that* business by the extraordinary remedy of mandamus? The court does not pretend to base its judgment upon any state or federal statute, but upon the principle of the common law (*Wisconsin R. R.* v. *Jacobson*, 179 U. S., 296), and that when these cars were loaded, and started on their journey out of the state, they did not become instrumentalities of interstate commerce until after the Mill company had lost the opportunity to change their destination, and therefore the transportation of the cars for over a mile from the mill by the Missouri Pacific Railway Company, over its own tracks, and onto and over the Santa Fe tracks, was a mere local or switching service, which the Missouri Pacific Railway Company, having voluntarily performed for a period of time, was in duty bound, *under the common law*, to forever thereafter continue.

By Section 6 of the original Interstate Commerce Act, as amended March 2nd, 1889, it was provided that:

"Every common carrier subject to this act shall also file with said commission copies of all contracts, agreements or *arrangements* with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party."

By the amendment of June 26th, 1906, known as the "Hepburn Bill," there was added to this section:

"No carrier, unless otherwise provided by this act, shall engage or *participate* in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for *any service in connection therewith,* between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit, in any manner or by any device, any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs, etc."

It is also provided by said section that all schedules filed shall "state separately all *terminal charges,* storage charges, icing charges, and all other charges which the commission may require, all privileges and facilities granted or allowed, and any *rules* or *regulations* which

in any wise change, affect or determine *any part* or the aggregate of such aforesaid rates, fares and charges, *or the value of the service rendered to the passenger, shipper or consignee.*"

When it is found as a fact (Finding Two, Rec. p. 32) that "the Mill company ships from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the State of Kansas, and into other states, etc.," is not the shipment—the transportation of that product—conclusively stamped with all of the essential characteristics of interstate commerce, and under the exclusive control of the provisions and requirements of the act to regulate commerce? The proviso to Section one of the act is that:

> "The provisions of this act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage or handling of property *wholly* within one state, and not shipped *to* or from a foreign country, or *to* any state or territory as aforesaid."

In the case of *Ry. Co.* v. *Inter. Com. Comm.*, 162 U. S., 940, the court, referring to the Interstate Commerce Act, said:

> "The scope or purpose of the act is, as declared in its title, to regulate commerce. It would therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a

partial treatment of the subject. * * * It would be difficult to use language more unmistakable signifying that Congress had in view the whole field of commerce (excepting commerce *wholly* within a state), as well that between the states and territories as that going to or coming from foreign countries. * * *

The significance of this language, in thus extending the judgment of the tribunal established to enforce the provisions of the act to the *entire service* to be performed by carriers, is obvious."

The state court, through its referee, finds that:

"No express contract is shown to exist between the two railroad companies requiring either to use or permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon, to be taken away or returned to the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of way, both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track, or of the right of way over which it passes."

And it is further found that:

"The practice in this matter was, when the mill company *desired to ship flour from its mill* by the Santa Fe, *it placed its order with the Santa Fe* for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill, and when the cars were loaded return them to the transfer track, *charge the Santa Fe* two dollars per car for the service, notifying *it* of the switching; the Santa Fe

would take the cars, bill them to destination, *collect all freight*, and pay the Missouri Pacific its switching charges. *In no instance did the Missouri Pacific issue bill of lading, waybill or receipt, or present or collect bills for freight or switching charges.*"

From the time the Santa Fe placed the empty car on the track, on the order of the Mill company, to be loaded at its mill with flour to be shipped out of the State of Kansas to another state, the car became an instrumentality of interstate commerce. It was owned by a carrier subject to the interstate commerce act. It was ordered for an interstate shipment, and loaded with flour for an interstate journey. Not only was it an instrumentality of interstate commerce, but was loaded with interstate freight.

The state court (Rec. p. 39), says:

> "It is plain that the taking of empty cars from the transfer track, and placing them at the mill, is nothing more than preparation for the act of interstate traffic which is to begin later. It needs a shipment of flour to initiate interstate commerce from the plaintiffs' mill, and so long as the flour remains in the mill, commerce has not begun."

Assuming that this is true, so far as the flour is concerned, what about the car as an instrumentality of interstate commerce?

In the case of *U. S.* v. *Terminal Co.*, 144 U. S., 863, the question was whether a terminal company, in transferring cars from the line or tracks of one company to

the line and tracks of another company, was engaged in interstate commerce. The court said:

> "If the car is being used by any of these lines for the transportation of interstate traffic, and its destination is to pass from one line to the other, it must pass through the yards of the terminal company, and be hauled by it. When, therefore, the terminal company is engaged in effecting a transfer of one of these cars from one line of railway to another, it is itself engaged in hauling a car used in moving interstate traffic. Thus far there can be absolutely no cavil.
>
> But what is the difference if it takes the car from one of the lines and moves it to its own team track, there to be unloaded, or moves it back empty, and places it in one of the lines again to be forwarded elsewhere? In either event it handles a car used in the designated traffic."
>
> *U. S.* v. *Ry. Co.*, 143 Fed., 360, 361.

In the case of *U. S.* v. *C. & N. W. R. R. Co.*, 157 Fed., 323, it was said that:

> "Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably

engages in interstate commerce. *Rhodes* v. *Iowa,* 170 U. S., 412, 418; *Kelley* v. *Rhoads,* 188 U. S., 1; *Houston Direct Nav. Co.* v. *Ins. Co. of N. A.,* 89 Tex., 1; *Leisy* v. *Hardin,* 135 U. S., 100; *Lying* v. *Michigan,* 135 U. S., 161; *Caldwell* v. *N. C.,* 187 U. S., 622."

In the case of *Johnson* v. *Southern Pacific,* 196 U. S., 22, it was urged that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for use, and the case of *Coe* v. *Errol,* 116 U. S., 517, was cited as supporting that contention, and this decision was relied upon by the state court in the case at bar. This court said:

> "The distinction between merchandise which may become an article of interstate commerce or may not and an instrument of commerce regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.
>
> Confessedly this dining car was under the control of Congress, while in the act of making its interstate journey, and, in our judgment, it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

That case only involved the status of the dining car. This case involves the status of all the cars necessary to

handle and transport from the mill in Kansas to other states three-fifths of all the product of its mill, for it is found as a fact that "the Mill company *ships* from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the State of Kansas, and into other states, etc;" and, in order that it may continue these shipments "into other states," the court, by its mandate, commands the Missouri Pacific Company "to immediately restore, resume and make transfer of cars, loaded and unloaded, from the lines of the A. T. & S. F. Rly. Company, and to and from its mill and elevators at the station and City of Stafford, * * * and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor."

By this "regulatory order," the state court has assumed exclusive control of the instrumentalities of interstate commerce used and necessary to be used in handling and transporting a large volume of interstate commerce. By this same "regulatory order" the court fixes and establishes, for all time to come, as between the Mill company and the railway company, an arbitrary terminal charge, and, by its sweeping mandate, absolutely nullifies and holds for naught all of the restrictions, limitations and requirements of the Interstate Commerce Act, and excludes the Interstate Commerce Commission from all jurisdiction, supervision and control of these instruments

of commerce, as well as the rates to be charged for terminal service in connection therewith.

If this order is binding and effective, it is not difficult to see how easy it will be for state courts, by a usurpation of prerogatives they do not possess, to thwart the will of Congress in its attempt to regulate commerce among the states.

FIFTH PROPOSITION.

THE RAILROAD TRACKS, SPURS, SWITCHES, TERMINALS, DEPOTS AND YARDS OF THE SANTA FE AND MISSOURI PACIFIC COMPANIES AT STAFFORD WERE INSTRUMENTALITIES OF INTERSTATE COMMERCE, AND AS SUCH THE REGULATION AND CONTROL THEREOF VESTED EXCLUSIVELY IN THE INTERSTATE COMMERCE COMMISSION. THE JUDGMENT OF THE STATE COURT IS NECESSARILY A REGULATION, NOT ONLY OF INTERSTATE COMMERCE, BUT THE INSTRUMENTALITIES OF INTERSTATE COMMERCE, WITHIN THE MEANING OF THE FEDERAL CONSTITUTION.

The court will probably take judicial notice of the great length of time consumed by both branches of Congress in the consideration of what is generally known

as the "Hepburn Bill." Every section of it was carefully considered, and the subject of lengthy debate by the ablest lawyers in the House and Senate. Great precaution was taken, not only to make every section clear, certain and unambiguous, but to cover the whole field of interstate commerce, by vesting in the Interstate Commerce Commission, not only full and complete power and jurisdiction over commerce among the states, but exclusive jurisdiction over all of the instrumentalities of that commerce *used* by every common carrier subject to the provisions of the act, and, by its express terms, it was made to apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one state or territory of the United States or the District of Columbia to any other state or territory of the United States, * * * Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property *wholly* within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid."

This proviso applies, by its express terms, only to the "transportation of passengers or property," etc. *wholly* with one state, and not shipped to or from any state or territory. It contains no restrictions or limitations upon *the carrier* "engaged in the transportation of

passengers or property *wholly* by railroad" from one state to another; nor does it place any restrictions or limitations upon the application of the act to the *instrumentalities* used by a carrier subject to the provisions of the act.

It is here worthy of note that the act in force prior to the adoption of the Hepburn Bill provided that "the term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease." When the act was amended June 29th, 1906, there was added by Congress to the definition of the term "railroad," as above defined, the following words, viz:

> "AND SHALL ALSO INCLUDE ALL SWITCHES, SPURS, TRACKS AND TERMINAL FACILITIES, OF EVERY KIND, *USED* OR NECESSARY IN THE TRANSPORTATION OF THE PERSONS OR PROPERTY DESIGNATED HEREIN, AND ALSO ALL FREIGHT DEPOTS, YARDS AND GROUNDS *USED* OR NECESSARY IN THE TRANSPORTATION OR DELIVERY OF ANY OF SAID PROPERTY."

And, in defining the term "transportation," amended the original act by adding thereto the words in italics as follows, viz:

"And the term 'transportation' shall include CARS AND OTHER VEHICLES, and all instrumentalities and facilities of shipment or carriage, IRRESPECTIVE OF OWNERSHIP OR OF ANY CONTRACT, EXPRESS OR IMPLIED, FOR THE USE THEREOF, AND ALL SERVICES IN CONNECTION WITH THE RECEIPT, DELIVERY, ELEVATION AND TRANSFER IN TRANSIT, VENTILATION, REFRIGERATION OR ICING, STORAGE, AND HANDLING OF PROPERTY TRANSPORTED; AND IT SHALL BE THE DUTY OF EVERY CARRIER SUBJECT TO THE PROVISIONS OF THIS ACT TO PROVIDE AND FURNISH SUCH TRANSPORTATION, UPON REASONABLE REQUEST THEREFOR, AND TO ESTABLISH THROUGH ROUTES AND JUST AND REASONABLE RATES APPLICABLE THERETO."

The whole part of the act demonstrates that the legislative mind intended a purpose to exercise exclusive control over every instrumentality of interstate commerce, and every agency by and through which it was carried on.

There is here no apparent ambiguity. The court is not called upon to define the term "railroad," as used in the act, for Congress has, in unmistakable language, furnished the definition.

In the case of *U. S.* v. *C. & N. W. R. R. Co.*, 157 Fed., 321-323, it was said that:

"Construction and interpretation have no function where the terms of the statute are plain and certain and its meaning is clear. In such a case Congress must be presumed to mean what it has plainly expressed. The natural, common or obvious meaning of the language of a law must be preferred, save in rare and exceptional cases, to a recondite signification evolved only by patient study and diligent search for it."

And this court said, in *Lake Co.* v. *R. R.*, 130 U. S., 670:

"So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." (*U. S.* v. *Fisher*, 2 Cranch, 358, 399; *Doggett* v. *R. R. Co.*, 99 U. S., 78.)

What did Congress mean when it said this act shall apply to any common carrier engaged "in the transportation of passengers and property wholly by railroad" from one state to another, except to clearly define *the carrier* subject to the provisions of the act? What did Congress intend when it defined the term "railroad" as including "all the road in use by any corporation operating a 'railroad,'" and should "also include *all* switches,

spurs, tracks and terminal facilities, *of every kind used* or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds *used* or necessary in the transportaion or delivery of any of said property? Did Congress mean to vest in the Interstate Commerce Commission exclusive or only partial control, supervision and jurisdiction over the "railroad," as thus specifically defined and described? If it was intended only a partial control, supervision and jurisdiction over the instrumentalities of interstate commerce, what section or word in the entire act may be pointed to as indicative of such purpose? It cannot be found in the act. On the contrary, as said by this court, before the amended Act of June, 1906, was adopted, in the case of *Ry. Co.* v. *Inter. Com. Comm.*, 162 U. S., 211:

> "The scope or purpose of the act is, as declared in its title, to regulate commerce. It would therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject.
>
> * * * *
>
> It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (except commerce *wholly* within a state), as well that between the states and territories as that going to or coming from foreign countries. 'In a later part of the section, it is de-

> clared that the term "transportation" shall include all instrumentalities of shipment of carriage.'
>
> Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations *all* carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that 'all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.'
>
> The significance of this language, in thus extending the 'judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers,' is obvious."

And, speaking of the causes which led up to the passage of the act, the court said:

> "As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

If the Act to regulate commerce (as it existed in 1895, when this decision was rendered), as construed by this court, had "in view the whole field of commerce

(excepting commerce *wholly* within a state)," "by whatever instrumentalities or carriage," etc., is there any answer to the proposition that the Act, as amended June 29th, 1906, includes, and was intended by Congress to include, all tracks, spurs, switches, terminal facilities, etc. *used* by any carrier subject to its provisions?

If the decision of this court to which reference has been made left the question in any doubt, does not this last expression of Congress conclusively demonstrate that it was the intention of Congress to place every interstate carrier, together with *all tracks, spurs, switches, cars, elevators, etc., used* by such carrier, under the exclusive control and supervision of the Interstate Commerce Commission? If this is a correct interpretation of the Act of Congress, has the state, by mandamus, or otherwise, the right to direct the use, or manner of use, of *any* instrumentality of an interstate carrier? When the carrier becomes an interstate carrier, does it not at once, by virtue of the statute, become a federal agency? Does not "*all* the road *used*" by such carrier, and "*all* switches, spurs, tracks and terminal facilities, of every kind, *used* or necessary in the transportation of persons and property" from one state to another, and *all* freight depots, yards, and grounds *used* or necessary in the transportation, *elevation* or *delivery* of any of said property," pass under the immediate and *exclusive* control and supervision of the Interstate Commerce Commission? Can any other reasonable or logical construction be placed upon

the language employed by Congress in the statute? The words *"all"* of the instrumentalities *"used"* are most significant. Every mile of track "used," every "switch," "spur," or "terminal facility," "used," every "car," "depot," "elevator," "yard," and the "grounds" "used" by an interstate carrier, are brought under the jurisdiction and control of the Interstate Commerce Commission. While Congress probably intended to except intrastate commerce, *that is, articles of barter and trade,* from the operation of the act, *yet the interstate carrier, as such,* and *all* instrumentalities *used* by it, are brought within the operation of the act, and under the jurisdiction and *exclusive* control of the federal government.

Keeping in mind the finding of fact that three-fifths of the entire volume of business of the Mill Company was shipped out of the State of Kansas, and to other states, we invite the attention of the court to Section 23 of Act to regulate commerce, adopted in June, 1906, as follows:

> "That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement, and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for

like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

It is conceded that the Santa Fe and the Missouri Pacific Companies are both common carriers, and subject to the provisions and requirements of this Act of Congress, because each comes within the definitions of the act. They each own a railroad, tracks, spurs, switches, terminal facilities, freight depots, yards and grounds at Stafford, Kansas.

In this connection, the attention of the court is specially directed to the last clause or paragraph of Section 1 of the Hepburn Bill, which reads as follows, viz:

> "Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering inter-

state traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonable, practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor, in writing, by any shipper, such shipper may make complaint to the commission, as provided in Section 13 of this act, and the commission shall hear and investigate the same, and shall determine as to the safety and practicability thereof, and justification and reasonable compensation therefor, and the commission may make an order, as provided in Section 15 of this Act, directing the common carriers to comply with the provisions of this section, in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all orders by the commission, other than orders for the payment of money."

By this clause Congress has clearly defined the duties and obligations of every carrier subject to the act, and by Section 23, *supra*, prescribed a remedy and designated the tribunal, and mapped out the procedure.

Again, we invite the attention of the court to Section 3 of the Hepburn Bill, as follows, viz:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

In neither of these sections, or in any other section of the Hepburn Bill, has Congress signified an intention to delegate to the states any of its power, supervision or jurisdiction over commerce "among the states," or any of the instrumentalities of the carriers subject to the provisions of the act. On the contrary, the debates in Congress when the bill was pending, the bill itself, and every word of it, point with unerring certainty to a purpose and intent to cover the "whole field of commerce" "among the states," and "all the road in *use* by any cor-

poration operating a railroad," including *"all* switches, spurs, tracks, and terminal facilities, of every kind, *used* * * * ; also *all* freight depots, yards and grounds used, etc." by any common carrier subject to the act. The "railroad" of the Santa Fe at Stafford, and the "railroad" of the Missouri Pacific at Stafford, and their respective "switches, spurs, tracks and terminal facilities, of every kind," are *used* by these interstate carriers possibly every hour of the day as necessary instrumentalities in the movement and transportation of interstate passengers and freight, and yet the state court, by its mandate and order, has denied the supervision of the Interstate Commerce Commission, the exclusive jurisdiction of the federal courts, as fixed by the Hepburn Bill, denied to the railroad company the equal protection of the law, and, by a "regulatory order," placed the use of the instrumentalities of these interstate carriers, subject to the demand of the Mill Company, "upon the payment of the heretofore customary charges therefor," and brands it "due process of law."

The commerce of this country during the last decade has grown to enormous proportions, and the Hepburn Bill was the result of an almost universal demand that there should be lodged in some central tribunal the power to regulate and control these great arteries of commerce. The Santa Fe system from Chicago to the Pacific Oecan, the Missouri Pacific system from St. Louis

to the Gulf, were each, in all of its parts, one comprehensive unit, and maintained and operated as such, and the attempted regulation by the local powers of each state was resulting in the practical nullification of the laws passed by Congress, as necessary and proper, in the exercise of its constitutional power, "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Some of the states, and especially the middle and western states, dominated and controlled by political highwaymen, seeking political preferment, have gone wild in their attempts to regulate, manage and control these great properties. The stockholders, the directors, the officers, the general managers, can do no act in the operation of their railroads except in subordination to the whims and caprices of Railroad Commissions, made up of farmers, doctors, lawyers, without previous experience, and whose terms of office depend upon the fulfillment of extravagant promises made in order to secure elections.

There was passed by the legislature of Nebraska in 1907 a maximum two cent passenger law. It may be interesting, if not instructive, to this court to know how the Railroad Commission of Nebraska attempted to enforce the law. The following is a copy of an order made, without notice, and without any hearing, viz:

"GENERAL ORDER NO. 1.

IN THE MATTER OF POSTING NOTICES CONCERNING THE APPLICATION OF THE TWO CENT PASSENGER RATE TO INTERSTATE TRAVEL.

Whereas, complaints have been made concerning the application of the two cent a mile passenger rate, particularly as applies to interstate travel:

It is hereby ordered by the Nebraska State Railway Commission that each and every railroad company owning, operating, managing or controlling any railroad, or part of a railroad, in the State of Nebraska, keep posted in a conspicuous place near the ticket window, in the waiting rooms of each and every passenger station on its lines in the State of Nebraska, the attached notice. This order to take effect fifteen (15) days from date.

NOTICE.

Notice is hereby given that the two cent a mile passenger rate is applicable only between points within the State of Nebraska.

The two cent rate is not applicable to a continuous ticket from a point within Nebraska to a point outside of Nebraska, and *vice versa*.

To secure the benefit of the two cent passenger rate in Nebraska, travelers going to other states should advise the agent of their destination, and request a ticket from their starting point to the station in Nebraska nearest to the point of destination, on the line or lines of road to be traveled. Upon arrival at the latter point, the traveler should secure a ticket to his destination and re-check his baggage, if any.

To illustrate: John Doe proposes to go from Grand Island Nebraska, to Chicago, Illinois, via Union Pacific. By paying the old rate, he may secure a continuous ticket from Grand Island to Chicago. If he desires to get the benefit of the two cent a mile passenger rate in the State of Nebraska, he should advise the agent of his destination, Chicago, and request a ticket from Grand Island, Nebraska, to the point in Nebraska nearest to his destination, Chicago, to-wit: Omaha, Nebraska. Upon arrival at Omaha, the traveler will have to secure a ticket from Omaha to Chicago, and re-check his baggage, if any.

Dated Lincoln, Nebraska, April, 1907.

Nebraska State Railway Commission,

Attest: By H. J. Winnett, Chairman.

Clark Perkins, Secretary.

(Seal.)"

The violation of which order subjected the carriers to fines and penalties which would have placed every railroad company operating in that state in the hands of a receiver.

Another order was made in January, 1908, as follows:

"GENERAL ORDER NO 6.

It is hereby ordered by the Nebraska State Railway Commission that, on and after the date of this order, the following rule shall govern the erection and location of depots, and the removal and abandonment of switches and spurs in Nebraska:

Rules governing erection and location of depots.

No change of freight or passenger depots or

flag-stations from their present location, or suspension of the sale of tickets, or the receiving or forwarding of freight from stations now in use for such purpose, will be permitted without the consent of the commission.

Permission for the location of depots and the construction of same must be secured from this commission. Application for such permits must be accompanied by all information necessary for a full and proper understanding of all interests to be affected thereby.

The commission reserves the right to pass upon the location of all switches and spurs.

Rules governing the removal or abandonment of switches and spurs:

No switches or spurs in use in this state shall be removed or abandoned without the consent of this commission.

Made and entered at Lincoln, Nebraska, this 27th day of January, A. D. 1908.

Nebraska State Railway Commission,

Attest: H. J. Winnett, Chairman.

Clark Perkins, Secretary."

From these and many like orders in Kansas and Nebraska, it will be seen that the powers and prerogatives of the Interstate Commerce Commission have been set aside and held for naught. These orders are as much in harmony with the Hepburn Bill as the order and mandate of the Supreme Court of Kansas sought to be reviewed in this proceeding.

In the great case of *Gibbons* v. *Ogden*, 9 Wheat, (U. S.) 1, it was said that:

"The framers of our constitution foresaw this state of things and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislature as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interferes with or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Again, it was said that:

"Commerce, in its simplest significance, means an exchange of goods, but, in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange, become commodities, and enter into commerce; *the subject, the vehicle, the agent and their various operations, become the objects of commercial regulations.* Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce. * * * If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. * * * Although one grant of power over commerce should not be deemed a total relinquishment

> of power over the subject, but amounting only to a power to assume, *still the power of the state must be at an end, so far* as the United States have, by their legislative act, taken the *subject under their immediate superintendence.*"

The powers vested in the Interstate Commerce Commission by the original Interstate Commerce Act, and the amendments therto, are so comprehensive as to lead irresistibly to the conclusion that it was the intention of Congress to control and regulate the *carrier*, to the exclusion of the state, and thereby exercise its exclusive function and power, under the constitution, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." There is probably not a pound of interstate freight moved by any of the great trans-continental lines which does not involve the movement of the cars into which it is loaded to and fro in the yards of the carrier. Yet, if the conclusion of the court below is correct, the laws of Congress regulating commerce have no application until the car in which the freight is loaded is in the train behind the engine which is to draw it from a point in the state to a designated point in another state. Such a narrow construction of the powers of Congress would lead to endless confusion, and precipitate conflicts between the state and federal governments, which seem to have been foreseen by this court many years before the commerce of this country had reached its present gigantic volume, for in *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1, it was said that:

> "When a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do; * * * the regulations which Congress deemed it proper to make are now in full operation."

Under the power expressly conferred by the constitution "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by the constitution in the government of the United States, or any department or officer thereof, Congress has deemed it "necessary and proper," for carrying into execution "the power to regulate commerce * * * among the states," to legislate, not only with reference to commerce itself, but has taken control of the regulation of *all* the instrumentalities of interstate commerce, and thereby expressly precluded the state from *any* control over or interference with such instrumentalities.

As often affirmed by this court, "the power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior." (*Gibbons* v. *Ogden, supra*).

So far as we are advised, the decision of this court in the case of *Hall* v. *DeCuir*, 95 U. S., 489, has never been questioned or modified. The reasons of the court in that case are absolutely controlling here. It was said:

"The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national control. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. * * * Uniformity in the regulations by which he (the carrier) is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with *exclusive* legislative power of determining what such regulations shall be."

Mr. Justice Clifford, in his concurring opinion, said:

"Congress, it is conceded, possesses the exclusive power to regulate commerce; and it is everywhere admitted that both traffic and navigation are included in its ordinary signification, and that it embraces ships and vessels *as the instruments of* intercourse and trade, as well as the officers and seamen employed in their navigation."

How can this case be distinguished from the case at bar? The "railroads" of an interstate carrier and the switches, spurs and terminals, are as much instruments of interstate commerce as the Mississippi River, and its tributaries.

Lottery Cases, 188 U. S., 346-375.

The power to regulate commerce between the states extends to the control of the navigable waters of the country. (*Scranton* v. *Wheeler*, 179 U. S., 160).

Again, referring to the Dining Car case, (196 U. S., 21-22), in which this court held that the dining car was under the control of Congress because "it was being regularly used in the movement of interstate traffic, and so within the law." In the case at bar it is found as a fact that a large volume of the business of the Mill Company was not only shipped to other states, but necessarily over the rails, tracks, switches and terminals of two interstate carriers. The two carriers, their cars, railroads, tracks, switches and terminals, were, by express provision of an act of Congress, brought under the supervision and control of the Interstate Commerce Commission, as also a large volume of business, the control and regulation of which is by the state court taken from the control and regulation of the tribunal created by Congress, and the carrier placed in a position, by judicial decree, that renders it utterly impossible for it to obey the mandate of the state court, and keep within the act of Congress, for this court has said, in *Gulf Rly,* v. *Hepley,* 158 U. S., 104, that:

> "The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement *may* expose a party to a conflict of duties. *It is enough that the two statutes operating upon the same subject matter prescribes different rules. In such case one must yield, and that one is the state law."*

The order and mandate of the state court cannot be justified upon the theory that it is the exercise of the po-

lice power of the state, for, in the same case, *supra*, the court said that the police power "must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all other reserved powers of the state, is subordinate to those in terms conferred upon the nation."

> " 'No urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the constitution.' *Henderson* v. *Wickham,* 92 U. S., 259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Light Co.* v. *La. Light & H. P. Mfg. Co.,* 115 U. S., 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority, as defined by the constitution, the latter must prevail.' *Morgan's La. T. R. & SS. Co.* v. *La. Board of Health,* 118 U. S., 455, 464.
>
> It is unnecessary to pursue this discussion further. The state statute and the national law operates upon the same subject matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact, under the power given to regulate commerce between the states. The state statute must, therefore, give way."

It has many times been affirmed by this court that:

> "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress;"

and

> "In the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulation, and not to a multitude of systems."

In the case of *Welton* v. *The State,* 91 U. S., 280, this court, among other things, said:

> "Commerce is a term of the largest import. * * * The power to regulate it embraces *all the instruments* by which such commerce may be conducted."

In the case of *Pensacola Tel. Co.* v. *West. Un. Tel* Co., 96 U. S., 9, speaking of the powers of the federal government under the commerce clause of the constitution, this court said:

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

When the constitution was framed and fashioned, we had no great arteries of commerce extending from the Atlantic to the Pacific, and from the Lakes to the

Gulf, as we have today, and it is doubtful if any member of the constitutional convention, in his wildest dreams, anticipated the development and progress which surrounds us today; yet, in the commerce clause of that great instrument, they "builded better than they knew," and its interpretation by Mr. Chief Justice Marshall and his associates, in *Gibbons* v. *Ogden*, more than three-quarters of a century ago, with all of our developments and progress, has never been questioned or changed or modified by this or any other judicial tribunal.

If, as said by the court in In re Rahrer, 140 U. S., 561, "by the adoption of the constitution, the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted," how can it be said that, since the passage of the Hepburn Bill, a state has any control or supervision, through any of its agencies, legislative or judicial, over any of the instrumentalities of interstate commerce, and especially those mentioned and described in the act of Congress.

This court has said (140 U. S., 560) that:

> "It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state."

Here are two great systems of railroad (the Santa Fe and the Missouri Pacific), the one extending from Chicago to the Pacific Ocean, traversing many states; the other from St. Louis to the Gulf, and to the Rocky

Mountains: each under one management; each operated as a comprehensive unit; each transporting annually millions of tons of freight; each having provided the necessary instrumentalities to enable it to handle this great volume of commerce, its tracks, spurs, switches, terminals, stations, depots, etc., and the State of Kansas, through its highest judicial tribunal, without any legislative authority therefor, and in plain violation of the act of Congress, issues a mandatory order to one of these carriers to leave its own tracks and right of way with its engines, and go on to the tracks and terminals of the other company, a duty not required by any known statutory rule or regulation. Is this due process of law? Is it giving to the Missouri Pacific Company that equal protection of the law guaranteed by the constitution? In so doing, has it not exercised a power and jurisdiction which, under the commerce clause of the constitution, and the acts of Congress in pursuance thereof, have been vested exclusively in the agencies of the federal government? If we are not correct in this, where is the limit to state regulation? In the regulation of one of these interstate carriers, if there is to be a joint regulation, where does the power of the state cease, and that of the federal government begin? Where is the dividing line?

Is not this question answered by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he says that: "The power of the state must be at an end, so far as the United

States have, by their legislative act, taken the subject under their immediate control?"

This whole subject was again considered by this court in the case of Northern Securities Co., 193 U. S., 319, and, as we think, the principle here contended for again re-affirmed. In that case, speaking of the power to regulate commerce, the court observed that: "the power to regulate it embraced all the instrumentalities by which such commerce is conducted;" that "such power is complete in itself, may be exercised to its utmost extent, and acknowledging no limitations other than are prescribed in the constitution;" that commerce among the several states was a *unit;* that the government ordained and established by the constitution was within the limits of the powers granted to it, "the government of all: its powers are delegated by all; it represents all, and acts for all," and is "supreme in its sphere of action;" and it is conceded by the court that commerce includes "not only the actual transportation of commodities and persons between the states, but also *the instrumentalities* and processes of such transportation."

It will certainly not be contended that the tracks, spurs, switches and terminals of each of these companies at Stafford, Kansas, are not instrumentalities of interstate commerce. This being conceded, it will certainly not be contended that Congress, when it especially designated such instrumentalities as subject to the provisions of the act, was engaged in an idle ceremony. Evidently

there was some evil to remedy, or rights to guard and protect. The power to act will be conceded. Congress has acted, and used language that cannot be misconstrued or misunderstood. There is here no ambiguity, and, if the act of Congress is within its constitutional power, then it follows that, under the many decisions of this court, any regulation or control of these instrumentalities is absolutely withdrawn from state agencies, and vested exclusively in the agencies of the federal government.

In the case of *R. R. Co.* v. *Fuller,* 17 Wal., 568, this court affirmed that commerce embraces "transportation by land and water, and *all* the *means and appliances necessarily employed in carrying it on.*"

Wisconsin v. *Duluth,* 17 Wal., 387.

The learned counsel for defendant in error contend that the service sought to be compelled is a mere "local switching service," but they completely overlook the fact that each, the Santa Fe and the Missouri Pacific, is engaged in the operation of railroads as necessary instrumentalities of interstate commerce, and that their respective lines traverse several states, and, in construction and operation, form a unit. The case of The Daniel Ball, 10 Wal., 564, would seem to be conclusive of the proposition for which we contend. The question in that case, or rather one of the questions, was whether the Grand River was a navigable water of the United States, and,

having found that it was, the court said that, "by its junction with the lake, it forms a continued highway for commerce, and is thus brought under the direct control of Congress in the exercise of its commercial power."

It was contended, however, in that case, that the steamer Daniel Ball, was only engaged in the internal commerce of the State of Michigan. The court said:

> "In this case it is admitted that the steamer was engaged in shipping and transportating, down Grand River, goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with or in continuation of any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan, and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed *as an instrument* of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more

states, does in no respect affect the character of the transaction. *To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.*

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

The language of the court that "We are unable to draw any clear and distinct line between the authority of Congress to regulate *an agency* employed in commerce

between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state," is most significant here, for if, as said by the court, "its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated."

> "The power to regulate interstate commerce is as complete upon the land as upon the navigable waters of the nation, and Congressional regulation upon the former must be interpreted by the same rules and enforced with the same efficiency as like regulations upon the latter." (*U. S.* v. *R. R. Co.*, 157 Fed., 326).
>
> "And the doctrine has been laid down with unvarying uniformity that when Congress has, *by any expression of its will*, occupied the field, that action was conclusive of any right to the contrary asserted under state authority."
>
> *United States* v. *C. & N. W. R. R. Co.*, 157 Fed., 321, 333.

The whole subject matter is fully covered by and included in the legislation of Congress, in its attempt to make laws "necessary and proper for carrying into execution" the express power "to regulate commerce with foreign nations, and among the several states, etc." These powers, having been "delegated to the United States by the constitution," are exclusive of the states. In every conceivable way has Congress, by supplemental legislation, broadened and extended the scope and purpose of

the original act to regulate commerce, and this court has given its approval of such legislation in the case of *Schemmer* v. *Ry. Co.*, 205 U. S., 1, and *Johnson* v. *Southern Pac. Ry. Co.*, 196 U. S., 1.

If a dining car "regularly used in the movement of interstate traffic" is "within the law," most certainly railroad tracks, switches and spurs, freight depots and yards owned and in constant use by a carrier subject to the provisions of the act, and which are indispensable to its status as an interstate carrier, must be held to be an instrumentality of interstate commerce, and its regulation under the exclusive control of the agencies of the federal government. A railroad, with its spurs, switches terminals, depots, yards and station, is necessarily a comprehensive unit. The Santa Fe Railroad, from Chicago to the Pacific Ocean, and to the Gulf, with its many miles of switches and spurs, is, in fact and in operation, a unit. So, also, the Missouri Pacific. The ownership or operation of a railroad track from one state to another is an indispensable prerequisite to bring these carriers under the operation of the "act to regulate commerce." When Congress said that these two carriers shall be subject to the provisions of the act, and provided in minutest detail for the regulation of their railroad by defining the term "railroad" to include *all* the road used and *all* the switches, spurs, terminals, freight depots, grounds, etc., used by them, was it intended to be a joint or divided or subordinate regulation? Or did it intend that the laws

it enacted in pursuance of the constitution should be the supreme law of the land?

We confidently assert that in all of the Congressional legislation on this great subject, there can nowhere be found any purpose or intention on the part of Congress to delegate or relinquish to the states any power or authority to regulate any part of any "railroad" of any carrier subject to the provisions of the act to regulate commerce, or any instrumentality of interstate commerce. It is true that every state has a sphere of action, where the authority of the national government may not intrude. Within that domain the state is as if the Union were not, but each state belongs to a Union, consisting of itself and all sister states. The constitution of that Union, and "the laws made in pursuance thereof, are the supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding;" and that law is as much a part of every state as its own local laws and constitution. (*Farrington* v. *Tennessee*, 95 U. S., 685.) "Against the national will the states have no power, by taxation or otherwise, to retard, impede, burthen, or *in any manner control*, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." (*Bank* v. *Deering*, 91 U. S., 34.)

It is true that this principle was announced in a case involving the jurisdiction of the federal government

over national banks, but does the fact that national banks were created by that government change the principle? The states can exercise no supervision or control over such banks, except such as may be permitted by Congress, and the federal government can exercise no supervision or control over a railroad company created by a state so long as its railroad and operations are confined within the state boundaries. As thus constructed and operated, the authority and jurisdiction of the state is supreme. When, however, by authority of its charter, or by comity between the state of its creation and adjoining states, its railroad, tracks and operations are extended into such other states, it is withdrawn from the regulation and control of its creator, and becomes immediately subject to the *exclusive* regulation and control of the federal government. It then becomes an interstate railway—an instrumentality of interstate commerce—as fully and completely as it would be if originally created under and by virtue of an act of Congress. The state, by permitting it to become an interstate carrier, and to extend its operations into another state, has impliedly, if not expressly, surrendered to the federal government the power of regulation and control. By virtue of Section 8, Article 1, of the constitution, the states have vested in Congress the power "to regulate commerce with foreign nations, and among the states, and with the Indian tribes," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and

only (Art. 10, Amendment to U. S. Const.) "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

The delegation of power to the United States to regulate commerce among the states is certainly more specific and definite and comprehensive than the implied delegation of power to authorize the creation of national banks, and yet this court has many times held that the states could exercise no control over or regulation of national banks not expressly authorized by Congress.

> *McCulloch* v. *Maryland,* 4 Wheat., 316;
> *Brown* v. *Maryland,* 12 Wheat., 419;
> *Farmers' Bank* v. *Deering,* 91 U. S., 34;
> *Davis* v. *Elmira Savings Bank,* 161 U. S., 283.

In the express delegation of power "to regulate commerce" among the states, there is no express or implied reservation "to the states respectively, or to the people," and it follows that Congress having acted, the states are without authority, for, as said by the court *in re Railway Co.* v. *Interstate Comm.,* 162 U. S., 211 *supra,* "It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce *wholly* within a state), as well that between the states and territories as that going to or coming from foreign countries." The purpose and intent of Congress, as construed by this court, was to avoid conflict and confusion.

In re Gibbons v. *Ogden,* 9 Wheat., 1, speaking of the purpose and intent of the framers of the constitution, it was said:

> "In every such case the act of Congress, or the treaty, is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.
>
> The power of the state must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate supervision."

In re Brown v. *Maryland,* 12 Wheat., 419, it was said:

> "The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of the state, but must enter its interior."

In re Sherlock v. *Alling,* 93 U. S., 103, it was said:

> "Whatever, therefore, Congress determines, either *as a regulation* or the liability for its infringement, is exclusive of state authority."

In re Henderson v. *Myer,* 92 U. S., 271, it was said:

> "Whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the state."

In re Hull v. *DeCuir,* 95 U. S., 489, *supra,* it was said:

> "If each state was at liberty to regulate the con-

duct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

And it was further said that:

"'Repeated decisions of this court have determined that the power to regulate commerce *embraces all the instruments by which such commerce may be conducted; and it is settled law that where the subject is national in character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.*"

In re County of Mobile v. *Kimball,* 102 U. S., 702, speaking of the regulation of commerce, the court said:

"There can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt the system. *Action upon it by separate states is not, therefore, permissible.*"

Gloucester Ferry Co. v. *Penn.,* 114 U. S., 204;
Brown v. *Houston,* 114 U. S., 632;
Walling v. *Mich.,* 116 U. S., 455.

In re Robbins v. *Shelby,* 120 U. S., 494, it was said:

"In the matter of interstate commerce, the United States are but one country, and *are and must be subject to one system of regulation, and not to a multitude of systems.*"

It certainly will not be denied that the tracks, yards, spurs, switches and terminals of each, the Missouri Pacific and Santa Fe Companies, at Stafford, are, and in

their very nature must be, instrumentalities of interstate commerce, and Congress, by its various acts affecting such commerce, has assumed exclusive control.

In re Bowman v. *Ry. Co.*, 125 U. S., 490, it was said:

> "That which does not belong to commerce is within the jurisdiction of the police powers of the state, and that which does belong to commerce is within the jurisdiction of the United States."

In re Stoutenburg v. *Hennick*, 129 U. S., 148, it was said:

> "The power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national, or admit only of one uniform system or plan of regulation throughout the country."

As was said in *Leisy* v. *Hadein*, 135 U. S., 108, speaking of the power vested in Congress, it "is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution."

In re McCall v. *Cal.*, 136 U. S., 108, this court affirmed that "commerce" includes the fact of traffic, and the fact of traffic "embraces all the *means, instruments* and *places* by and in which intercourse and traffic are carried on, and *further still, comprehends the act of carrying them on at these places, and by and with these means.*"

"THE POWER OF CONGRESS IS SUPREME OVER THE WHOLE SUBJECT (OF INTERSTATE COMMERCE), UNIMPEDED AND UNEMBARRASSED BY STATE LINES OR STATE LAWS; IN THIS MATTER THE COUNTRY IS ONE, AND THE WORK TO BE ACCOMPLISHED IS NATIONAL, AND STATE INTERESTS, STATE JEALOUSIES, AND STATE PREJUDICES DO NOT REQUIRE TO BE CONSULTED, IN MATTERS OF FOREIGN AND INTERSTATE COMMERCE, THERE ARE NO STATES." (Mr. Justice Bradley in *Stockton* v. *Railroad Company*, 32 Fed. Rep., 9, p. 17.)

As was said by this court in *re Gulf Ry. Co.* v. *Hefley*, 158 U. S., 104:

> "It is no answer to say that in this case the defendant might have complied with both the state and national statute. * * * *The question is not whether in any particular case operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties.* It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield, and *that one is the state law.*"

Under Section 1 of the "Act to Regulate Commerce," as amended June 29th, 1906, specific provision is made by Congress, vesting in the Interstate Commerce Commission exclusive jurisdiction to investigate the matters complained of by the Mill Company in this proceeding, now before the court. Under that section a "shipper may make complaint to the commission, * * *

and the commission shall hear and investigate the same," and make necessary orders, and a remedy is provided for enforcing the order.

In this case the carriers were each subject to the acts of Congress. Three-fifths of the mill company's business to be moved over these tracks and terminals is found to be interstate business. Instead of making application to the Interstate Commerce Commission, for it to investigate and make an order, as the facts might warrant, the Mill company makes complaint to the Supreme Court of Kansas, based upon no statutory duty, but upon the common law, and that court exercised a jurisdiction and prerogative expressly withdrawn from it by an act of Congress. Is there not here a manifest conflict between the state and the federal government? Which is the "supreme law of the land"—the act of Congress, or the mandate of the state court? Suppose the Santa Fe objects to the use of its tracks and its terminals. Would not the federal court have authority and jurisdiction to enjoin such use? Would the mandate of the state court be any defense, in the face of that part of Section 3 of the Commerce Act, which provides that it shall not be construed "as requiring any such carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

In re Scranton v. *Wheeler*, 179 U. S., 160, speaking of the power to regulate commerce, this court said that

it extends to "*all other instrumentalities of commerce which, in the judgment of Congress,* may be necessary or expedient."

In the case of *Johnson* v. *S. P. Co.*, 196 U. S., 21-22, this court points out a marked distinction between merchandise which may become an article of interstate commerce, or may not—"and *an instrument regularly used in moving interstate commerce.*"

By the express terms of the Hepburn Bill, the "railroad" of an interstate carrier includes *all* the track used —switches, spurs, terminals, etc.—and so "within the law." Is not the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, in principle, conclusive in favor of our contention?

When the act to regulate commerce was amended by Congress, in defining the term "railroad," as used in the act (by adding to the original section the following words, viz:

"AND SHALL ALSO INCLUDE ALL SWITCHES, SPURS, TRACKS AND TERMINAL FACILITIES, OF EVERY KIND, USED OR NECESSARY IN THE TRANSPORTATION OF THE PERSONS AND PROPERTY DESIGNATED HEREIN; AND ALSO ALL FREIGHT DEPOTS, YARDS AND GROUNDS USED, OR NECESSARY, IN THE TRANSPORTATION OR DELIVERY OF ANY OF SAID PROPERTY."

Did not Congress intend to place such instrumentalities under the exclusive control of the agencies of the fed-

eral government? If not, what was the purpose of Congress? Could language be plainer or more significant? If the "switches, spurs, tracks and terminal facilities, etc.," referred to in the amendment are not instrumentalities of interstate commerce, when connected with the railroad of an interstate carrier, and whose road is operated as a unit, then what relation do they bear to such commerce, and such carrier? Without the "railroad" and its "switches, spurs, tracks and terminal facilities," the carrier could not engage in the business of an interstate carrier.

In the case of *Gloucester Ferry Co.* v. *Penn.*, 114 U. S., 204, *supra*, Mr. Justice Field said that:

> "The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions. The power also *embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.* The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regula-

tions which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress, therefore, alone can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

What did the court mean in speaking of commerce among the states, and the power of Congress to regulate it, when it said that "the power also *embraces within its control all the instrumentalities by which that commerce may be carried on,* and the means by which it may be aided and encouraged?"

In the Lottery case, 188 U. S., 358, Mr. Justice Harlan said:

> "Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

In the recent case of *Armour Pck. Co.* v. *U. S.*, 209 U. S., 78, it was said that:

> "The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of *wholly* domestic commerce in the last clause of Section one of the original act of 1887, and in the declaration of the scope and purpose of the act declared in its title. *Texas & Pacific Ry. Co.* v. *Inter. Com. Comm.*, 162 U. S., 197-211."

Congress has entire authority over interstate commerce, and the states have like authority over intra-state commerce, but wherever there is a conflict the law of Congress made in pursuance of the federal constitution is supreme. It does not follow that an instrumentality of interstate commerce, if used in the transportation of intra-state commerce, passes, even temporarily, from the control of federal agencies.

It is provided by the Act of Congress entitled: "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," that:

> "From and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system.

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This act was sustained by this court in the case of *Johnson* v. *S. P. Ry. Co.*, 196 U. S., 1-19. By the terms of the act, it is made unlawful for any common carrier engaged in interstate commerce by railroad to use *on its line* any locomotive engine, etc., or to haul, or permit to be hauled, on its line any car used in moving interstate traffic not equipped with brakes and couplers, etc., as prescribed by the act.

Suppose the State of Nebraska should enact a law prescribing safety appliances on cars used in intra-state traffic entirely different from those prescribed by Congress, and a car load of sugar should be shipped from St. Louis, Missouri, to Falls City, Nebraska, over the Missouri Pacific rails, in a car equipped as required by this act of Congress. The car in which the sugar was transported, and the rails over which it moved to Falls City, would each be an instrumentality of interstate commerce. At Falls City the sugar was unloaded, and the same car there loaded with corn consigned to parties in Omaha, and, as thus loaded, was placed in a through train from St. Louis to Omaha, and moved over the rails of the Mis-

souri Pacific Company to Omaha, without making any change in the safety appliances with which it was equipped when it left St. Louis. En route from Falls City to Omaha did the car cease to be an instrumentality of interstate commerce, and the company become amenable to the laws of Nebraska, for failure to have the car equipped with the safety appliances prescribed by the legislature of Nebraska? The rails of the Missouri Pacific Railway Company form a continuous line from St. Louis to Omaha, and are therefore an instrumentality of interstate commerce. It is safe to say that there is not an engine in operation on the line that is not daily engaged in moving interstate traffic, and there are very few, if any, freight cars on the entire system which are not in use, or intended and properly equipped for use, in the movement of interstate traffic. Is it possible that each state may prohibit the use of any of these engines and cars in intra-state traffic until they shall be equipped with the appliances prescribed by the state? The car loaded with sugar in St. Louis, and hauled to Falls City, and there loaded with corn, and hauled to Omaha, may there be immediately loaded with wheat for Kansas City, and there loaded with hay for St. Louis, Missouri. Every time a car loaded with interstate commerce is unloaded, and reloaded with intra-state traffic, must the safety appliances prescribed by the state be placed on the car? Can worse confusion be imagined? It is safe to assert that

every so-called local freight train carries cars loaded with interstate traffic, over the rails and lines of carriers subject to the provisions of the Hepburn Bill. It is also safe to assert that each the State of Kansas and the State of Nebraska has made laws regulating these carriers and the instrumentalities of interstate commerce, which cannot be obeyed and at the same time the rules and regulations prescribed by Congress observed. It is a matter of common knowledge that each state attempts to out-do the others in extravagant and drastic legislation. For instance, in Kansas, in obedience to the demands of the commercial travelers, a law was passed requiring freight trains to take on and let off passengers; and then, to satisfy the stock shipper, passed another act penalizing the companies if their freight trains failed to make an average speed of fifteen miles an hour. Many other illustrations might be given to show the wisdom of the principle announced by this court that "Congress alone has the power to occupy, by legislation, the whole field of interstate commerce;" (188 U. S., 358), and that it had, by legislation, covered the "entire field," and that its "scheme of regulation," by that legislation, had not been "restricted to a partial treatment of the subject" (162 U. S., 211).

Judicial notice may be taken of the methods generally used in railroad operations in the United States. It is well known that railroads use their entire equipment indiscriminately in interstate and intra-state busi-

ness. The railway service is organized on the basis of complete interchangeability of equipment among carriers. Railroads do not set aside part of their equipment to be used in intra-state business, and another portion to be used for carrying interstate business. Both these kinds of traffic are handled in the same cars and in the same trains, and on the same tracks.

In the recent decision of this court in the case of *Interstate Commerce Comm.* v. *C. G. W. Ry. Co.*, 209 U. S., 108-123, it was said that:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Int. Com. Com.* v. *Ala. Mid. R. R. Co.*, 168, U. S., 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed. Rep., 37-50:
>
> 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their

> own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' "

The state court, in the order and mandate complained of, and in the opinion given in support of it, seem to have proceeded upon the theory that it was invested with all the powers and prerogatives of a "general manager" of the property and business conduct and arrangement of the Missouri Pacific Railway Company, and established a rule for that company in the management and operation of its property and terminals at Stafford, Kansas, which can never hereafter, however burdensome or unreasonable it may be or become, be abrogated, changed or modified by any other "general managers" of the company, a rule—a regulation—so inflexible—so immutable—that the court which made it does not have the power or jurisdiction to change or modify it after the term at which it was made. It established a precedent which, if adhered to and followed in the future, takes away from railroad companies in Kansas all power, control and management of their properties, and transfers it to and vests it in the judicial branch of the state government, and to the exclusion of the agencies of the federal government.

There can be no middle ground in this great problem. There can be no partial or divided jurisdiction over these great railroad properties. The question is no longer local, but national. A great political contest is now

being waged in this country, and the "paramount issue" seems to be regulation of the instrumentalities of commerce. But the "battle of the ballots" will not settle the problem. It may not—*cannot*— be permanently settled to the satisfaction of all the people except by this court, and when it is so settled, and removed from the domain of politics, we will have peace and contentment, but not until then.

As was most forcibly said by a distinguished federal judge:

> "What is needed today is not that the constitution shall be construed to mean precisely what it meant to Marshall or to Miller, Field and Bradley, but that it shall be applied to present conditions by the same method and in the same spirit wherewith they applied it to the conditions of their times. In the performance of this, their highest duty, the federal courts are no part of the administration. They will not answer to its needs or its criticisms. But they are a part of the nation, and in the past have responded, and ought always to respond to the deep, abiding organic changes in the national life.
>
> There never was a time when the interpretation of the constitution required a more careful consideration of living conditions than today. Within the last fifty years economic forces have been introduced into our life that are as revolutionary of pre-existing conditions as the introduction of gunpowder was of the state of feudalism. Seward's statement in the debate of 1850 that "Commerce is the god of boundaries, and no man now living can tell its ultimate decree," is far more true at present than when it was uttered. When the constitution

was adopted the unit of our social and business life was the commonwealth. With the exception of the foreign and coasting trade, the commerce and industry of each state was confined to its own borders. The union was political instead of industrial or commercial. Today our industry and our commerce are national. They are made aware of state lines only by conflicting and often narrowly selfish enactments. The units of commercial and industrial organization extend to many states, often to the entire nation. Instead of being required to obey one master, business is compelled to obey many. Coincident with this enlargement of business enterprise to embrace different states, has occurred a revolution in state activity. * * * Government is now present in all lines of business. When the state regulated but little, business was not much concerned who did the regulating. But now that all governments are competing in their zeal for regulation, whether one government or many, the nation or the states, shall do the regulating, becomes a matter of paramount importance. These changed conditions in our actual life compel a reconsideration of our divided governmental authority to see what now belongs to the nation, and what to the states. The problem is not the same as it was; it cannot be answered by reading history or studying precedents.

The new condition has manifested itself most conspicuously in two fields, the railroad and the interstate industrial corporation. At the beginning the railroads were local. There was a time when in making a shipment of freight from New York to Buffalo, at least three different bills of lading were required. Now five great systems embody more

than three-fourths of the total mileage of the country, and the work of consolidation is still in progress. There are no longer state roads, but all are instruments of interstate commerce. Actual statistics are wanting, but persons in a position to know are of the opinion that the local business of the railroads does not exceed fifteen per cent of their entire traffic. In a case tried in one of our western states a few years ago, it was judicially found that the local business there involved amounted to less than three per cent. In the face of these conditions, it is impossible to maintain over common carriers the manifold control of the different states and the Federal government.

There is no way in which local business can be separated from through business. The same roadbed serves both; both are carried in the same train and by the same crew. * * *

The chief domestic cause for the adoption of the Constitution was to destroy the power of states over interstate commerce. But does not their control of railroads re-establish that authority? To say that states shall not regulate commerce among the states, and at the same time concede to them power to regulate the only instrumentalities by which that commerce is carried on, is to establish in practice what we deny in theory. Hitherto state regulation has been inefficient, and for that reason alone its localizing power has not become manifest. But now, through the investigations of economists and commissions, the general campaign of publicity, experience in rate litigation, the decreased influence of railroads over legislative bodies, there has come a new era in governmental regulation of carriers. State authority is becoming organized, energetic and effective. If continued, it will work its inevitable

results. In commerce, as in politics, state governments will represent state interests. No rivalry can surpass that of our commercial centers, and the state in which they are located, let their power over carriers become effective, will exercise that power in support of their own cities. This is not theory. Only recently the commission of one of our most aggressive western states warned the railroads by a written communication that if they were not more considerate of the state as to interstate rates, the commission would retaliate by the exercise of its powers over local affairs. Other commissions, while not thus frank in their avowals, have been equally local in their practices. The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce. In thus maintaining the commercial supremacy of the nation, they have been compelled to withstand the importunities and fierce wrath of local interests. Now, however, the conflict is to be transferred from this field of economics to the field of government. Localism is to speak, not by petition, but by statute. Under this regime, as governmental control increases in efficiency the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition, and the intensity of the passions aroused. It has already brought us to the verge of civil war in North Carolina, and been the occasion of the sharpest acrimony in other states. Such a conflict must in the end result in the complete supremacy of one authority or the other.

It is vain to appeal to states, as did Secretary Root, in his New York address, to subordinate local advantage to the general welfare. Our whole his-

tory is a confirmation of the statement of Mr. Pinckney in the constitutional convention that: 'States pursue their interests with less scruple than individuals.' They exhibit all that lack of conscience characteristic of those who exercise delegated power. As Justice Miller points out in his lectures on the Constitution, had it not been for the dominant authority of the central government, the general welfare would have been as completely sacrificed to local selfishness under the constitution as it was under the articles of confederation. What states require is not exhortation, but authority. * * *

How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the Constitution, and which was the source of all the powers and restrictions embodied in that instrument. It presents a case 'to which the separate states are incompetent, and in which the harmony of the United States may be interrupted by the exercise of individual legislation.' As to railroads, there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case, as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or interstate, the railroad is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi River one hun-

dred and seventy-eight statutes dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. The power under the commerce clause of the Constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railroad, as an instrument of commerce, can only be dealt with justly and efficiently by a single authority, the Federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the Federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just. Public opinion will have a single point for its direction, and will not be dissipated among many conflicting authorities. The subject does not demand separate rules for the separate states. Their action refutes such a doctrine. By the legislation of the past winter, Virginia and Ohio, Pennsylvania and Minnesota, are combined in the same passenger rate, though they vary as five to one in density of population and travel. The subject is national, and the Federal government, with its national outlook, can, by organized investigation and accumulated experience, best acquire the skill and knowledge necessary for its just and efficient regulation."

The Hepburn Bill was made a law to meet these unfortunate conditions, but, until construed by this court, will result in no substantial good. The conflict between state and federal power goes on, and has been waged for such a length of time as to drive capital from the field of investment. The growth of the country and its commerce has been phenomenal, and it is not extravagant to assert that in tonnage and volume it is today twenty-five years in advance of existing transportation facilities. It was recently stated by eminent authority upon the subject that there should be expended in transportation facilities, within the next ten years, at least six thousand millions of dollars, in order to meet the demands of rapidly increasing commerce—but will it be done, if every state may adopt its own rules and regulations as to that part of every instrumentality of commerce which happens to be located within its borders? The question has become intensely national. Population is increasing. New territory is being opened. The semi-arid districts on every hand are presenting evidences of successful agriculture, and the one thing needed, the developing influences of increased railroad transportation, protected and regulated by and through the power of centralized government, unembarrassed by state regulation and control.

Respectfully submitted,

BALIE P. WAGGENER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE LARABEE FLOUR MILLS COMPANY, A PARTNERSHIP COMPOSED OF F. D. LARABEE AND F. S. LARABEE,
DEFENDANTS IN ERROR.

STATEMENT OF CASE.

The following diagram will show the location of the tracks of the Missouri Pacific Railway Company, and of the Atchison, Topeka & Santa Fe Railway Company, and the Larabee Mills at Stafford, Kansas:

D
R
G
M P R
f
TRANSFER TRACK
A.T.&S.Fe
C
A
LINE
A T & S FE. R.R.
MAIN
B

Line "A" represents the main line of the Santa Fe Railway Company; line "B" the main line of the Missouri Pacific Railway Company; line "C" the transfer track owned by the Santa Fe Company; "D" the mill of the Larabee Company; "E" the spur track running from the main line of the Missouri Pacific Railway Company. The distance from "F" to "G" on the main line of the Missouri Pacific Railway Company is about one mile.

The defendant in error applied for a writ of mandamus (Rec., pp. 1-3), and an alternative writ was allowed and issued (Rec., pp. 4-5), which commanded the Missouri Pacific Railway Company as follows:

"Now, therefore, being desirous that justice may be done in the premises, you, The Missouri Pacific Railway Company, the defendant herein, are hereby commanded that you immediately restore, resume and make transfer of cars, loaded and unloaded, to and from the line of the Atchison, Topeka & Santa Fe Railway Company, and to and from its mill and elevators at the station and city of Stafford, in the County of Stafford, and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor, and that you at once and without delay, issue upon all shipments of grain by the plaintiff in car load lots from its mill and elevators at said station, without the condition in the bills of lading therefor that it is not responsible for loss or damage therefor."

A plea in abatement was filed (Rec., pp. 9-11)—to which plaintiff demurred, (Rec., pp. 8-9, which was sus-

tained by the court, (Rec., p. 12), and defendant filed answer. (Rec., pp. 13-16). A commissioner was appointed to take the testimony, (Rec., pp. 16-17, and make findings of fact (Rec., pp. 32-38), which are as follows, viz:

FIRST.

"In the succeeding findings The Missouri Pacific Railway Company will be referred to as 'The Missouri Pacific': the Atchison, Topeka and Santa Fe Railway Company as 'The Santa Fe:' The Missouri Valley Car Service and Storage Association as 'The Car Service Association;' and the Plaintiff as 'The Mill Company.'

SECOND.

"Stafford is a flourishing town of 1600 people in Stafford County, Kansas, surrounded by a large scope of country productive of large annual crops of wheat. The Missouri Pacific and the Santa Fe each have a line of railroad running practically east and west through Stafford, with freight and passenger stations and side tracks and station facilities thereat.

"The Mill Company has, and for more than four years has had, a flouring Mill of one thousand barrels daily capacity, and continuously operates this mill except on Sundays. This mill is located along side the tracks of the Missouri Pacific and a short distance from its freight station. The tracks and freight stations of the two roads are separate a distance of one mile, and the Santa Fe station and station facilititse are one mile from the mill. The Mill company ships from its mile over these two roads substantially its entire product, three fifths of which is so shipped out of the state of Kansas and into other states, and two

fifths to points within the state of Kansas. The Mill
65 Company purchases a large portion of its grain at Stafford, which is delivered in wagons at the mill; and purchases a large portion of its grain at points distant from Stafford, all of which is shipped to it in carload lots over these two roads, and delivered to it at the mill by the Missouri Pacific. The Mill Company sells its product to dealers, and the larger portion of its output is shipped to customers most conveniently reached by shipping from Stafford by the Santa Fe, and a large portion is shipped to customers most conveniently reached by shipping from Stafford by the Missouri Pacific.

THIRD.

"The Missouri Valley Car Service and Storage Association, is an unincorporated voluntary association of a number of railroad companies, having a manager and other employees. The object and the duty of this Association is to represent, serve, protect the interest, and enforce the rights of the members thereof in the matter of the interchange of freight cars, the prompt loading, unloading, and return of cars interchanged, or delivered to shippers, for traffic purposes.

"This Association has been in operation for many years, and from a time prior to any of the transactions mentioned in this investigation, and its objects and operations and methods have been generally understood by commercial shippers by car load lots, and generally acquiesced in as a proper instrument for securing to the shipping public the greatest amount of service from the available car supply of the roads composing it. The Association has adopted and had in effect since January 1, 1904, a body of rules, a printed copy of which accompanies these findings.

FOURTH.

"The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distance westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection the Santa Fe in the year 1903 constructed at its own expense a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri
66 Pacific line is located in Prairie Avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, or on its right of way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go entirely off its own track and right of way both in going after cars standing on said Santa Fe transfer track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right of way over which it passes.

"FIFTH.

"Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars to be by the Missouri Pacific taken therefrom and placed for loading with flour at the Mill Company's Mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At

the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill and when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; The Santa Fe would take the cars, bill them to destination, collect all freight and pay the Mis-
67 souri Pacific its switching charges. In no instance did the Missouri Pacific issue Bill of Lading, way bill, or receipt, or present or collect bills for freight or switching charges.

"SIXTH.

"When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the transfer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

"SEVENTH.

"In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning cars as hereinbefore out-

lined in no instance was any distinction made between cars intended to be used in carrying flour to points out of the state, and cars intended to carry to points within the state of Kansas.

"EIGHTH.

"The custom and practice described in the fifth and sixth, paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car load lots, except the Mill Company.

"NINTH.

"I find as a fact that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks located on the Missouri Pacific line at Stafford, all cars furnished by the Santa Fe required for the shipment of freight in car load lots out over the Santa Fe; and also hold themselves out and
68 undertake to likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford.

"TENTH.

"From December 12, 1905, to April 26, 1906, fifty two cars taken empty from the transfer track by the Missouri Pacific and placed at or near the mill for loading, were detained after the expiration of forty eight hours from 7 A. M. of the day following their placing, before they were loaded by the Mill Company and ready to be returned to the transfer track. The total time of such detention was

equivalent to the detention of one car eighty six days. The agent of the Missouri Pacific acting under the direction of the Car Service Association, which for this purpose represented both the Santa Fe and the Missouri Pacific, assessed against the Mill Company a car service or demurrage charge of one dollar per day for each day each of said cars was so detained after the expiration of free time, which assessment amounted to a total charge of Eighty six dollars.

"From July 24 to August 14, 1906, twenty nine cars loaded with wheat taken by the Missouri Pacific from the transfer track and placed at or near the mill to be unloaded and reloaded with flour, were detained after the expiration of the free time allowed, before they were reloaded and ready to be returned to the transfer track. The total time of such detention was equivalent to the detention of one car one hundred and four days.

"The agent of the Missouri Pacific acting as above, added to the free time to be allowed these cars to the extent of twenty six days, for the reason that the Missouri Pacific wholly failed to do any switching or placing of cars on July 26 when there were five cars, and on July 27 when there were six cars and on July 30 when there were fifteen cars requiring switching and placing; and thereupon assessed against the Mill Company car service charges on account of such detention amount in the aggregate to Seventy eight dollars.

"ELEVENTH.

"After the car service charges on the loaded
69 cars had been assessed, the Agent of the Missouri Pacific under instructions from the Car Service Association demanded of the Mill Company the payment of the whole of the car service charges assessed, both the

eighty six dollars on account of empty and the seventy eight dollars on account of loaded cars. Thereupon the Mill Company offered to pay the eighty six dollars on account of the empty cars, and refused to pay the seventy eight dollars on account of loaded cars, basing its refusal on the ground that the delay and detention of the cars was not caused by its fault, but was caused by the defective in sufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading.

"The Agent of the Missouri Pacific under the instruction of the Car Service Association refused to accept the eighty six dollars or any sum less than the whole of the two amounts, and demanded the payment of the whole of the two amounts with the understanding that the Mill Company might present a claim for the return of any excess charges it claimed had been made, which claim would be investigated by the Car Service Association, and if it found excess or unjust charges had been assessed, the amount so found would be refunded to the Mill Company. The Mill Company still refused to comply with that demand.

"TWELFTH.

"On August 29, 1906, and after the Mill Company had refused to make payment of the entire claim for car service charges, the Missouri Pacific by the direction of the Car Service Association ceased and refused to make further delivery to the Mill Company of empty cars placed on the transfer track for the use of the Mill Company by the Santa Fe, and still refuses to make such delivery. The only object and purpose of the Car Association in directing, and of the Missouri Pacific in the refusal to make such further delivery of such empty cars to the Mill Company is to compel it to pay the whole of both amounts of car service charges under the understanding described in paragraph

eleven by the enforcement of the rules of the car
70 service association. The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service.

"THIRTEENTH.

"As a result of the refusal to make delivery of empty cars as described in paragraph twelve, the Mill Company when desiring to ship any of its products from Stafford by the Santa Fe is compelled to haul the same in wagons from its mill to the station of the Santa Fe and load into cars from wagons. This entails upon the Mill Company great inconvenience and great additional expense in the management of its business.

"FOURTEENTH.

"During the period covered by the car service charges on loaded cars constituting the seventy eight dollars so demanded, an unusual and heavy demand was being made upon the Missouri Pacific for the transportation to market of a newly harvested crop of wheat then ready for market, along that portion of its line from Conway Springs to Larned in Kansas. The freight service on that portion of its line was performed throughout the year—a single engine and train crew, passing from Conway to Larned and return. The transfer and switching service performed by the Missouri Pacific hereinbefore described, was performed by this single engine and crew. Ordinarily and by the train schedule this engine and crew passed through Stafford and performed such transfer and switching service once in the early part and once in the latter part of each day except Sunday;

and when so performed with reasonable promptness and regularity, this single engine and crew were capable of performing the service to the satisfaction of the Mill Company. The engine so used was old and frequently defective and out of repair. The single engine and crew were not sufficient or equal to meet the unusual demand of the business of that part of the line during the period mentioned, and perform the transfer and switching service in question with promptness or regularity.

71 "During the period mentioned the Mill Company made its applications from time to time to the Santa Fe for such number of cars in addition to the loaded cars consigned to it which it might reasonably anticipate would arrive at the same time, as it deemed necessary in its business, but not for a greater number of cars to be delivered at one time than, together with such loaded cars, it could load within the free time allowed if such empty and loaded cars were properly placed with reasonable promptness.

"FIFTEENTH.

The crowded condition of the business on the Missouri Pacific during that period and the general character of its motive power and train crew were well known to its agent, as well also to the Santa Fe and to the Mill Company.

"When the Mill Company placed its applications for cars with the Santa Fe it could not certainly know the day on which they would be placed on the transfer track, or know with certainty on what day loaded cars consigned to it over the Santa Fe would arrive and be placed on the transfer track; or know that at such times such cars could not be properly placed by the Missouri Pacific with reasonable promptness, and removed when reloaded with like promptness. The Missouri Pacific did not better or increase

its motive power or train service to meet the increased and unusual demand of its business during the period mentoned.

"SIXTEENTH.

"I find as a fact that the detention of the loaded cars beyond the free time allowed, on account of which the disputed car service to the amount of seventy eight dollars was assessed against the Mill Company, was caused as much by the fault and defective motive power and insufficient train service of the Missouri Pacific, as from any fault or omission on the part of the Mill Company."

Section 2 of Rule XI. and section 1 of Rule X. of the Missouri Valley Car Service Association read as
72 follows:

"Sec. 2. On deliveries to private sidings, should consignees or consignors refuse to pay or unnecessarily defer settlement of bills for car service, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made to them on the public delivery tracks of the company, after the payment of freight charges at his office. Agent will promptly notify Manager of action taken.

"Section 1. The Manager is authorized to entertain claims and refund car service charges in special cases. Claims should be made direct to the Manager, with paid car service bills attached, and each claim should carry with it a full statement of the grounds upon which reduction of the car service is requested."

Thereafter the court entered judgment, allowing the peremptory writ of mandamus, as prayed for, (Rec., p. 30), and which order or judgment reads as follows:

JOURNAL ENTRY OF JUDGMENT.

"This cause comes on for decision and thereupon it is ordered and adjudged that the Peremptory Writ of Mandamus prayed for by the plaintiff be *allowed*, and that judgment herein be entered against the defendant, and that the Peremptory Writ of Mandamus be issued to the defendant, commanding it to immediately restore, resume and make transfer of cars loaded and unloaded from the line of the A. T. & S. F. Rly. Co. and to and from its mill and elevator at the station and city of Stafford in the county of Stafford and State of Kansas upon the request and demand of the plaintiff and upon the payment of the heretofore customary charges therefor. And further commanding it to at once and without delay issue upon all shipments of grain by the plaintiff, Larabee Flour Mills Co. in car load lots from its mill and elevator at said station, without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor."

SPECIFICATIONS OF ERROR.

FIRST.

The Supreme Court of Kansas erred in sustaining demurrer to plea in abatement. (Rec., p. 12.)

SECOND.

The said court erred in deciding that the service which the plaintiffs, by their proceedings in mandamus herein, required the defendant, as a railway company, to perform for them, and for which services the said court, by its order and judgment herein, required defendant, as such railway company, to perform for plaintiffs, were not in any part service in the carriage of Interstate Commerce, and therefore governed in said defendant's performance thereof by the acts of congress to regulate commerce, and the amendments thereto, and that said acts of congress and amendments, by their proper construction, did not apply to govern the said defendant in the performance of said service, or its refusal to perform the same.

THIRD.

The said court erred in deciding that the subject matter of said suit, nor any part thereof, was not governed by the provisions of the acts of congress to regulate commerce, and the amendments thereto.

FOURTH.

The said court erred in deciding, contrary to Section 8, Article 1, of the Constitution of the United States, and contrary to the acts of congress to regulate commerce, and the amendments thereto, that the defendant was under legal obligation to perform service for plaintiff in the transfer and carriage of cars loaded with property, the subject of Interstate Commerce, and destined to points without the state of Kansas.

FIFTH.

The court erred in assuming jurisdiction of said controversy in so far as it involved the instrumentalities in use by an interstate carrier, and the subject matter of Interstate Commerce.

SIXTH.

That said court, by its judgment and order awarding a peremptory writ of mandamus, denied to the said Missouri Pacific Railway Company the equal protection of the laws, and compliance therewith would deprive said Company of its property, without due process of law, and without compensation.

SEVENTH.

The said court, under the Constitution of the State of Kansas, and the Constitution and laws of the United States, had no jurisdiction of said controversy.

BRIEF AND ARGUMENT.

FIRST.

The Supreme Court of Kansas erred in sustaining Demurrer to Plea in Abatement.

The demurrer admits the allegations of the plea in abatement. (Rec., pp. 9-11.) It admits that the "Missouri Pacific" and "Santa Fe" companies were each interstate carriers, and that the tracks and road of each were used in the transportation of interstate commerce; that the business of the Larabee Flour Mills Company was the "shipment and transfer of grain, flour, meal and other products from its said location to other points in the United States of America, and to foreign points;" that the application for a manadmus herein was for the purpose of requiring and compelling this defendant, as such common carrier, to give the use of its tracks and terminal facilities for the purpose of interstate traffic to the said Atchison, Topeka & Santa Fe Railway Company, engaged in like business with this de-

fendant, in violation of the requirements and provisions of the Interstate Commerce Act, and the amendments thereto. The demurrer was sustained. (Rec., p. 12.)

It is provided by section 3, chapter 104, 24 U. S. Stat., 380, that:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivery of passengers and property to and from their several lines, and those connecting therewith; and shall not discriminate in their rates and charges between connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

No reason was given by the court for sustaining the demurrer. If the facts stated in the plea in abatement were true, and this is admitted by the demurrer, the same should have been overruled.

Ry. Co. vs. Int. Comm. Comm., 162 U. S., 184;
R. R. Co. vs. Penn., 136 U. S., 114;
Fielder vs. Ry. Co., 42 S. W. Reptr., 362;
Stock Yards vs. R. R. Co., 118 Fed., 113;
McNeil vs. Ry. Co., 202 U. S., 543.

SECOND.

The Supreme Court of Kansas erred in deciding that the service which the plaintiffs, by their proceedings in mandamus herein, required the defendant, as a railway company, to perform for them, and for which services the said court, by its order and judgment herein, required defendant, as such railway company, to perform for plaintiffs, were not in any part services in the carriage of interstate commerce, and therefore governed in said defendant's performance thereof by the acts of congress to regulate commerce, and the amendments thereto, and that said acts of congress and amendments, by their proper construction, did not apply to govern the said defendant in the performance of said service, or its refusal to perform the same.

The said court erred in deciding that the subject matter of said suit, nor any part thereof, was not governed by the provisions of the acts of congress to regulate commerce, and the amendments thereto.

The said court erred in deciding, contrary to Section 8, Article 1, of the constitution of the United States, and contrary to the Acts of Congress to regulate commerce, and the amendments thereto, that the defendant was under legal obligation to perform service for plaintiff in the transfer and carriage of cars loaded with property, the subject of interstate commerce, and destined to points without the state of Kansas.

Specifications of error numbers second, third and fourth involve substantially the same questions and propositions, and will be considered together

IT WILL BE OBSERVED, BY REFERENCE TO THE APPLICATION FOR THE WRIT, (Rec., pp. 1-3) AND THE ALTERNATIVE WRIT (Rec., pp. 4-5), THAT NO CLAIM IS MADE THAT THE RAILROAD COMPANY HAS DISREGARDED OR FAILED TO COMPLY WITH ANY STATUTORY REQUIREMENT.

The court below, in the opinion filed (Rec., p. 42) states that:

"There is no reason why, in a case involving a right *not of statutory creation, and not depending upon any statute for its enforcement*, the complainant may not apply directly to this court for the desired relief."

The decision of the court is not based upon any constitutional or statutory requirement of the State of Kansas. The court states in the opinion that: "Under findings eighth and ninth, the *only* question is if the plaintiff shall be given the same service afforded to other industries at Stafford." (Rec., p. 38).

This is a most remarkable conclusion, in view of the fact that, in the application for the writ, and in the alternative writ, (Rec., pp. 1-5), there is not the slightest intimation of any unjust or other discrimination in favor of *other* industries at Stafford. In fact, the peremptory writ is not asked upon any such basis.

In this connection we desire to impress upon the court the fact that there were no contractual relations existing between the Missouri Pacific Railway Company and the Larabee Flour Mills Company. It is stated in the application for the writ (Rec., p. 2) that: "The defendant company charged the plaintiff two dollars for each car, etc.;" and in the alternative

writ that the "the defendant charged for such transfer service the sum or price of two dollars per car"; "that the plaintiff at all times had promptly paid for such service, etc." There is no finding of fact that the Mill Company ever paid a dollar to the Missouri Pacific Railway Company. In fact, the finding of fact is just the reverse, (Rec., pp. 33-34), and, in the opinion of the Supreme Court of Kansas, it is stated that "the Missouri Pacific" *"relied upon the implied contract of the Santa Fe to pay the value of the service performed."* (Rec., p. 38). It is also specifically found that:

"In no instance did the Missouri Pacific issue bill of lading, way-bill, or receipt, or present or collect bills for freight or switching charges." (Rec., p. 34).

And it is said by the court below that: (Rec., p. 38).

"When the transfer track was built, the defendant was under no obligation to do switching over it or from it, either for the Santa Fe or for the shippers at Stafford."

And thereupon the court proceeds to hold that, because the defendant company *"voluntarily"* performed a service for a shipper, it was under no obligation to perform, it was "hornbook law" that it could *never* thereafter discontinue such service, and thereupon, not by reason of any contract, —not by reason of any statutory requirement, but by reason of such *"voluntary"* act on the part of the Railroad Company, there was created a duty by way of estoppel, the inde-

finite continuance of which might be enforced by the extraordinary writ of mandamus. In other words, as soon as the railroad company "voluntarily" performed the service for *any* length of time, the shipper, who was the beneficiary of such service, *thereby* secured a vested right to an indefinite continuance of the original "voluntary" service—which "vested right" the court would perpetuate by mandamus. But there was no issue made by the pleadings, and no finding of fact upon which to base any such theory or conclusion. The findings are most specific and definite (Rec., pp. 33-34) that there was no service performed over the transfer track by the Missouri Pacific Railway Company at the instance of or upon the request of the Mill Company, but, when it "desired to ship from its mill by the Santa Fe, it placed its order with the Santa Fe for the number of cars desired"; and in no instance did the Mill Company pay the Missouri Pacific Company for the service it "voluntarily undertook" to perform for the Santa Fe Company.

In the case of Brownville vs. Loague, 129 U. S., 500, it was said by this court that:

"Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be co-erced must have the power to perform the act."

In In re ex parte Cutting, 94 U. S., 20, it was said:

"The office of a *mandamus* is to compel the performance of a plain and positive duty."

Northern Pac. R. R. Co. vs. Dustin, 142 U. S., 498-509.

In the findings it is stated that: (Rec., p. 32)

"The Mill Company ships from its mill over these two roads substantially its entire product—*three-fifths of which is so shipped out of the state, and into other states, and two-fifths to points within the state of Kansas.*"

The court below held that this did not constitute any part of the business of interstate commerce, (Rec., p. 39), and states, as reason therefor, that: "After a car has been loaded and returned to the transfer track, the Santa Fe may, for *lawful* reasons, decline to receive it. If it does receive it, there is neither a consignee nor a destination for it until the Mill Company has given shipping directions. The preliminary stage has still not been passed."

There is not a word in any finding of fact upon which to predicate this conclusion. On the contrary, it is found (Rec., p. 34) that:

"The practice in this matter was, when the Mill Company desired to ship flour from its mill *by the Santa Fe*, it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill, and, when the cars were loaded, return them to the

transfer track, charge the *Santa Fe* two dollars per car for the service, notifying it of the switching. *The Santa Fe would take the cars, bill them to destination, collect all freight,* and pay the Missouri Pacific its switching charges."

In performing this service, the Missouri Pacific either acted as the agent of the Santa Fe, or as a connecting carrier.

The court below says: (Rec., p. 38.)

"The defendant became, and, under the findings, still is, a common carrier of loaded and empty freight cars to and from the transfer track, and its own station a mile away."

In this case it will be conceded that each, the Missouri Pacific Railway Company and the Santa Fe Railway Company, are interstate carriers, owning and operating railway lines from the Lakes to the Gulf, and from the Mississippi River, through the State of Kansas, to the Pacific ocean. It is alleged that the annual business of the Mill Company is about one and a half million dollars, (Rec., p. 1), and it is found, *as a fact* (Rec., p. 32) that "the Mill Company *ships* from its mill, over these two roads, substantially its entire product—three-fifths of which is so *shipped* out of the State of Kansas, and into other states, etc."

The service performed by the Missouri Pacific Railway Company was with the engine and crew of its regular through trains. (Finding No. 14, Rec., pp. 36-37).

The court below seems to place its decision upon the ground that the service performed was purely local, and was not impressed with any interstate feature—but this conclusion of law is not supported by any finding of fact, but is contrary to the finding that "*the Mill Company ships from its mill over these two roads* substantially its entire product, —three-fifths of which is *so shipped* out of the State Kansas, and into other states, etc." The handling of this large business from a point within the state to other states is taken control of by the court below—notwithstanding the fact that Congress by and through the Interstate Commerce Act, has provided the means for regulating it—and, by its order and mandate, excluded and denied the authority and jurisdiction of the Interstate Commerce Commission.

According to the findings of fact (Rec., p. 34), the Missouri Pacific Railway Company, if not a connecting carrier, was the agent of the Santa Fe Company. When a car of flour was loaded at the Mill Company's mill, it was into a car which had been provided by the Santa Fe Company, in pursuance of an order placed with it by the Mill Company, and, when so loaded, the Missouri Pacific Company would take it, the Mill Company having released control, and the "Santa Fe would take the cars, bill them to destination, collect all *freight*, and pay the Missouri Pacific its switching charges. *In no instance did the Missouri Pacific issue bill*

of lading, way bill, or receipt, or present or collect for freight or switching charges." (Rec., p. 34).

This court has many times held that there could be no divided jurisdiction and authority between the state and federal governments over interstate commerce. We believe that the decisions of this court lead to the logical conclusion that, when a carrier becomes an interstate carrier, and its rails and equipment used as an instrumentality of interstate commerce, it passes under the exclusive control of Congress.

The powers vested in the Interstate Commerce Commission by the original Interstate Commerce Act, and the amendments thereto, are so comprehensive as to lead irresistibly to the conclusion that it was the intention of Congress to control and regulate *the carrier*, to the exclusion of the states, and thereby exercise its exclusive function and power, under the Constitution, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." There is probably not a pound of interstate freight moved by any of the great trans-continental lines which does not involve the movement of the cars into which it is loaded to and fro in the yards of the carrier. Yet, if the conclusion of the court below is correct, the laws of Congress regulating commerce have no application until the car in which the freight is loaded is in the train behind the engine which is to draw it from a point in the state

to a designated point in another state. Such a narrow construction of the powers of Congress would lead to endless confusion, and precipitate conflicts between the state and federal governments, which seem to have been foreseen by this court many years before the commerce of this country had reached its present gigantic volume, for in the great case of Gibbons vs. Ogden, 9 Wheat. (U. S.,) 1, it was said that:

"When a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do; * * * the regulations which Congress deemed it proper to make are now in full operation."

Under the power expressly conferred by the Constitution "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof," Congress has deemed it "necessary and proper, for carrying into execution "the power to regulate commerce * ** among the states", to legislate, not only with reference to commerce itself, but has taken control of the regulation of *all* the instrumentalities of interstate commerce, and thereby expressly precluded the state from *any* control over or interference with such instrumentalities.

It is provided by the Interstate Commerce Act, among other things, that:

"The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, f a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered, in the transportation of

passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

* * * *

That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time, schedule, carriage in different cars or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act.

* * *

That, in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court

in every case of recovery—which attorney's fee shall be taxed and collected as part of the costs in the case.

* * *

That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act.

* * *

That the commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued; the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employes and the salaries paid each class; the amount expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier

each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the commission may require; and the said commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe, (if, in the opinion of the commission, it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

And it is provided by the Act of March 2nd, 1903, as follows:

"That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake, and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automa-

tically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

That when any person, firm, company or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

That from and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car, for greater security to men coupling and uncoupling cars.

That, within ninety days from the passage of this act, the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw-bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw-bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw-bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States

by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July 1st, 1894, and immediately to give notive thereof as aforesaid. And, after July 1st, 1895, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

It was further said in Gibbons vs. Ogden, cited *supra*, that:

"The framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislature as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interferes with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Again, it was said that:

"Commerce, in its simplest significance, means an exchange of goods, but, in the advancement of society, labor, transportation, intelligence, care and various mediums of

exchange, become commodities, and enter into commerce; *the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulations.* Shipbuilding, the carrying trade, and ¶propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce. * * * If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. * * * Although one grant of power over commerce should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still *the power of the state must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence.*"

Can any other conclusion be reached, taking into consideration the comprehensiveness and scope of the Interstate Commerce Acts now in force, than that it was the intention of Congress that the United States should take not only interstate commerce, but every instrumentality of such commerce, under its "immediate superintendence"? If such was the intention of Congress, as said by this court, "the power of the state must end."

The principle announced in Gibbon v. Ogden, *supra*, was approved in the case of Brown v. Maryland, 12 Wheat., 419, in which Chief Justice Marshall said:

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be

forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combinations. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of Gibbons v. Ogden (9 Wheat. Rep., 1), in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior."

If the "power is co-extensive with the subject on which it acts," then we submit that Congress, by and through the Interstate Commerce Acts, has not only impliedly, but *expressly*, excluded every state from any interference with or control over any part of the instrumentalities of an interstate carrier, including its rails, equipment and instrumentalities used in the discharge of its duties to the public,—except, perhaps, only the power of police regulation.

In the case of Wilson v. Black-Bird-Marsh Co., 2 Pet. (U. S.), 245, it was said:

"If Congress had passed any act which bore upon the case,—*any act in execution of the power to regulate commerce*, the object of which was to control state legislation over these small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states,—we should feel not much difficulty in saying that a state law coming in conflict with such act would be void."

There is not a single detail of railroad operation which is not provided for by the Interstate Commerce Acts, and other acts relating to interstate carriers. The rails of many railroad companies extend continuously from ocean to ocean. Every car is engaged, more or less, in the transportation of commerce between the states. These tracks and cars are under the immediate control and supervision of the Interstate Commerce Commission, and the constant

surveillance of the Federal government. Can a state exercise like supervision and control over these same instrumentalities because, perchance, some of the freight in them is intra-state, without producing an unseemly and oft times an embarrassing conflict with the federal authorities?

Suppose a freight car at Salina, Kansas, is loaded one-half with freight consigned to Topeka, Kansas, and the other half to St. Louis, Missouri. While en route from Salina to Topeka, is the car under the supervision and control of the United States or the state of Kansas, or both? Is the car engaged in interstate or intra-state commerce, or both, between Salina, Kansas, and Topeka, Kansas?

We are not contending that the *mere* grant to Congress of the power to regulate commerce deprived the states of all control over and regulation of an interstate carrier within the borders of the state. That question does not necessarily arise in this case, for the reason that, as we have shown, Congress has acted, and, by appropriate legislation, manifested an intention to exercise exclusive control and supervision of all interstate carriers, and instrumentalities of interstate commerce.

Cooley v. Board, 12 How. (U. S.), 299.

In the case of R. R. Co. v. Fuller, 17 Wal., 568, it was said:

"Commerce is traffic, but it is much more. It embraces also transportation by land and water, *and all the means and appliances necessarily employed in carrying it on.*"

In the case of Welton v. State of Mo., 91 U. S., 281, it was said:

"The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens."

This court, in speaking of the police power, when invoked, as paramount to the power of Congress to regulate commerce, in the case of Henderson v. Mayor, etc., 92 U. S., 271, among other things, said:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because, whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on

which their enactment rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may, at the same time, be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency, and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable. But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of power it may fall, or how closely allied to powers conceded to belong to the states.

'It has been contended,' says Ch. J. Marshall, 'that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress, in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy, not of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme.' Where the Federal government has acted, he said: 'In every such case the Act of Congress or the treaty is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it.' Gibbons v. Ogden, 9 Wheat., 210.

It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of Congress or treaty of the United States. Such a proposition is supported by the opinion of several of the judges in the Passenger cases; by the decisions of this court in Cooley v. Bd. of Wardens, 12 How., 299; and by the cases of Crandall v. Nevada, 6 Wall., 35, (73 U. S., XVIII, 96). But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that, under the commerce clause of the Constitution, or within its compass, there are powers which, from their nature, are exclusive in Congress; and, in the case of Cooley v. Bd. of Wardens, it was said that: 'Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this, for it may properly be called 'international.' It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is, in fact, in an eminent degree a subject which concerns our

international relations, in regard to which foreign nations ought to be considered, and their rights respected, whether the rule be established by treaty or by legislation."

South Carolina v. Georgia, 93 U. S., 10, 12.

In the case of Sherlock v. Alling, 93 U. S., 103, it was said that:

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, *and the instruments by which it is carried on.* * * * Whatever, therefore, Congress determines, either as a regulation or the liability for its *infringement, is exclusive of state authority.*"

In the case of R. R. Co. v. Husen, 95 U. S., 469, it was said that:

"Whatever may be the power of a state over commerce, that is *completely* internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to Congress in the same words in which it is given over the other; *and in both cases it is necessarily exclusive.*"

And it was also said by the court, approving what was said in the case of Henderson v. Mayor, *supra*, that it is "clear, from the nature of our complex form of government, that whenever the statute of a state invades the do-

main of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, *or how closely allied it may be to powers conceded to belong to the states.*"

In the case of Hall v. DeCuir, 95 U. S., 489, the court used language which, by analogy, applies most forcibly to the questions now before the court. In that case it was said that:

"If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interest of others. * * * Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and, to secure it, Congress, which is untrammeled by state lines, has been invested with the *exclusive* power of determining what such regulations shall be."

Mr. Justice Clifford, in a concurring opinion, said (p. 494):

"Congress, it is conceded, possesses the exclusive power to regulate commerce, and it is everywhere admitted that both traffic and navigation are included in its ordinary signification, and that it embraces ships and vessels *as the instruments of intercourse and trade*, as well as the officers and seamen employed in their navigation. * * * Repeated decisions of this court have determined that the power to

regulate commerce embraces *all the instruments by which such commerce may be conducted; and it is settled law that where the subject is national in character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.* Whatever subjects of this power, says Mr. Justice Curtis, are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as *to require exclusive* legislation by Congress. * * * Unless the system or plan of regulation is uniform, it is impossible of fulfillment."

Again, it was said (pp. 498-499) that:

"Congress, it is conceded, possesses the exclusive power to regulate commerce; and it is everywhere admitted that both traffic and navigation are included in its ordinary signification, and that it embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen employed in their navigation. People v. Brooks, 4 Den., 469.

* * * * * *

Repeated decisions of this court have determined that the power to regulate commerce embraces all the instruments by which such commerce may be conducted; and it is settled law that where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. Whatever subjects of this power, says Mr. Justice Curtis, are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require ex-

clusive legislation by Congress. Cooley v. Bd. of Wardens, 12 How., 299.

* * * * * *

Differences of opinion may exist as to the extent and operation of the national law regulating commerce among the several states, but none, it is presumed, will venture to deny that it is regulated very largely by Congressional legislation. Admit that, and it follows that the legislation of Congress, if constitutional, must supersede all state legislation upon the same, and, by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave some particular matter to be regulated by the several states. Cooley v. Bd. of Wardens, *supra.*

* * * * * *

Whenever the terms in which a power is granted to Congress, or the nature of the power, requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to exercise the power. Sturges v. Crowninshield, 4 Wheat., 122; Brown v. Maryland, 12 Wheat., 419.

* * * * * *

Commerce among the several states, as well as commerce with foreign nations, requires uniformity of regulation; and that power is by the Constitution vested exclusively in Congress, as appears by the Constitution itself, and by an unbroken course of the decisions of this court, covering a period of more than half a century.

* * * * * *

Congress having legislated upon the subject, it cannot be that the state legislature have a right to interfere

and prescribe additional regulations, as the legislation of Congress clearly indicates that the national law makers never intended to leave anything open upon the subject to the discretion of the state legislatures.

* * * * * *

Many efforts have been made to analyze and expound the opinion delivered by the great magistrate in that case, but none, it is believed, were ever atended with such complete success as that of the commentator to which reference is made. He was the Chancellor of the State Court, and gave the original opinion, and, when he found that his decree was reversed by the Supreme Court, he was influenced by the highest motive to ascertain the true grounds assumed in the judgment of the Appellate Court.

Judge Story says, in his Commentaries on the Constitution, that it has been settled, upon the most solemn deliberation, that the power to regulate commerce is exclusive in the government of the United States; and he adds, in another section of the Commentaries, that the reasoning by which the power given to Congress to regulate commerce is maintained to be exclusive has not of late been seriously controverted, and that it seems to have the cheerful acquiescence of the learned tribunals of a particular state, one of whose acts brought it first under judicial examination. 2 Story, Const., 3 ed., secs. 1067, 1071; Steamboat Co. v. Liningston, 3 Cow., 713; People v. Brooks, 4 Denio, 469; Pomeroy, Const., 3d ed., sec. 371; Sergeant, Const., 2d ed., 308; Rawle, Const., 2d ed., 82; R. R. Co. v. Husen decided at the present term (*ante*, 527).

* * * * * *

Mr. Hamilton, in the 31st number of the Federalist, says that there is an exclusive delegation or alienation of

state sovereignty in three cases; first, where the exclusive power is in terms given to Congress; second, where an authority is granted to the Union, and the states are prohibited from exercising a like authority; third, where an authority is granted to the Union, to which a similar authority in the states would be absolutely and wholly contradictory and repugnant.

Even suppose that the power to regulate commerce falls within the third designation; still it is believed that sufficient has already been remarked to show that the nature of the power is such that it shows that the powers should be exclusively exercised by Congress. Cooley v. Bd. of Wardens, 12 How., 299; Penn. v. Wheeling Bridge Co., 13 How., 518; S. C., 18 How., 421 (59 U. S., XV. 435)."

That the regulation of commerce, and all instrumentalities of commerce, is a national question no one can gainsay or deny. The passage of the Hepburn Bill, and the provisions of the same, taken in connection with the original Interstate Commerce Act, most conclusively demonstrates that it was the intention of Congress to place every officer, employe, servant and agent, as well *as the business*, of every interstate carrier, including the tracks, cars, equipment and instrumentalities, of every kind, nature and description, under the exclusive control and supervision of the Interstate Commerce Commission. No joint or divided jurisdiction and power was conferred, or attempted to be delegated. To permit a state, now that Con-

gress has acted, to exercise *any* control over the interstate carrier, or *any* of the instrumentalities of interstate commerce, will necessarily result in that confusion and conflict which this court has so uniformly condemned. It is true that all interstate carriers transport and handle intra-state business, but is not such business a matter of grace, rather than of right? If handling intra-state business, by an interstate carrier, should prove to be a burden upon interstate commerce, would not Congress have the right to interdict and prohibit it? Has not Congress already delegated to the Interstate Commerce Commission ample power to interdict and prohibit such intra-state business, if it should be made to appear that engaging in such intra-state business was a burden upon interstate business? Can the commerce of this great country, which has increased in volume far in excess of the transportation facilities, be controlled and regulated, except through "one uniform system or plan of regulation?"

In the case of County of Mobile v. Kimball, 102 U. S., 702, it was said that:

"For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country, *and the authority which can act for the whole country can alone adopt the system.* Action upon it by separate states is not, therefore, permissible."

In the case of Gloucester Ferry Co. v. Penn., 114 U S., 204, speaking of the power of Congress to regulate commerce, this court said that:

"The power also embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. * * * While with reference to some of them, which are local and limited in their nature, or sphere of operation, the states may prescribe regulation *until Congress intervenes and assumes control of them;* yet, when they are national in their character, and require uniformity of regulation affecting alike all of the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the country; and it needs no argument to show that the commerce with foreign nations, and between the states, which consists in the transportation of persons and property between them, is a subject of a national character, and requires uniformity of regulation."

It was held in the case of Brown v. Houston, 114 U. S., 632, that:

"It may be laid down as the settled doctrine of this court at this day that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations."

In the case of Walling v. Michigan, 116 U. S., 455, it was said:

"We have so often held that the power given to Congress to regulate commerce with foreign nations, among

the several states and with the Indian tribes, is exclusive in all matters which require or only admit of general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject,—the most important of which are collected in Brown v. Houston (*ante*, 257), and need not be cited here. We have also repeatedly held that, so long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammeled, and that any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom. Welton v. Mo., 91 U. S., 282 (Bk., 23, L. ed., 350); County of Mobile v. Kimball, 102 U. S., 697 (Bk. L. ed., 239); Brown v. Houston (*supra*). In Mr. Justice Johnson's concurring opinion in the case of Gibbons v. Ogden, 9 Wheat., 222 (22 U. S., bk. 6, L. ed., 76), his whole argument, which is a very able one, is based on the idea that the power to regulate commerce with foreign nations, and among the several states, was, by the Constitution, surrendered by the states to the United States, and, therefore, must necessarily be exclusive; and that where Congress has failed to restrict such commerce, it must necessarily be free. He says: 'Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by Act of Congress, any otherwise than by not being forbidden.' * * * 'The grant to Liningston and Fulton interferes with the freedom of intercourse among the states.' The same sentiment was expressed by Mr. Justice Grier in his opinion in the Passenger cases, 7 How., 462 (48 U. S., bk. 12, L. ed., 777), where he says: 'And to what weight is that argument en-

titled, which assumes that, because it is the policy of Congress to leave this intercourse free, therefore, it has not been regulated, and each state may put as many restrictions upon it as she pleases.'"

Pickard v. Pullman Co., 117 U. S., 49;

Wabash Co. v. Illinois, 118 U. S., 569-577.

In the case of Robbins v. Shelby Tax Dist., 120 U. S., 494, it was said that:

"In a word, it may be said that, in the mater of interstate commerce, the United States are but one country, and are and must be, subject to one system of regulations, and not to a multitude of systems. The doctrine of freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

Fargo v. Michigan, 121 U. S., 245-247.

In the case of Bowman v. Ry. Co., 125 U. S., 490, the broad proposition was stated and approved that:

"That which does not belong to commerce is within the jurisdiction of the police powers of the state; and that which does belong to commerce is within the jurisdiction of the United States."

It is provided by Section 1 of the Acts of June 29th, 1906 (ch. 3591, 34 Stat., 584), that:

"The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with

any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported."

Could language be any more specific and definite? The transfer track of the Santa Fe Company was a spur or terminal facility, used for handling cars destined for interstate points. Three-fifths of the cars were loaded and intended for points beyond the state of Kansas. Congress has placed this track and these cars under the control and supervision of the Interstate Commerce Commission, as "instruments and facilities of shipment and carriage." In a concurring opinion, Mr. Justice Field said (Bowman v. Ry. Co., *supra*, at pages 507-508):

"Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state

to another, Congress can alone act upon it, and provide the needed regulations.

* * * * * *

It is a matter of history that one of the great objects of the formation of the Constitution was to secure uniformity of commercial regulations, and thus put an end to restrictive and hostile discriminations by one state against the products of other states, and against their importation and sale. 'It may be doubted,' said Chief Justice Marshall, 'whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which induced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American government took, and justly took, that strong interest which arose from a full conviction as to its necessity.'" Brown v. Maryland, 25 U. S., 12 Wheat., 446."

In the case of Stoutenburgh v. Hennick, 129 U. S., 148, it was said that:

"The conclusions announced in the case of Robbins were that the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national, or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free;

that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."

The opinion of this court in the case of Leisy v. Hardin, 135 U. S., 108, is not only instructive, but would seem to be conclusive in support of our contention that the order of the court below is in violation of the Constitution of the United States, and the laws made in pursuance thereof. In that case it was said that:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

* * * * * *

The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local inter-communication, to the progress and development of local prosperity, and to the protection, the safety and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; but where, in relation to the subject matter, different rules may be

suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley v. Philadelphia Bd. of Wardens, 53 U. S., 12 How., 299.

* * * * * *

Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled.

* * * * * *

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination.

* * * * * *

The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that

power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or, in other words, what is or is not a regulation of such commerce."

In the case of McCall v. Cal., 136 U. S., 108, the court said that:

"Pomeroy, in his work on Constitutional Law, Section 378, referring to the signification of the word 'commerce,' says:

'It includes the *fact of intercourse and of traffic*, and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments* and places by and in which intercourse and traffic are carried on, and further still, comprehends the act of carrying them on at these places, and by and with these means."

In the case of In re Rahrer, 140 U. S., 555, it was said:

"The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. Robbins v. Shelby County Tax Dist., 120 U. S., 489. And

if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof. Gibbons v. Ogden, 22 U. S., 9 Wheat., 210. That which is not supreme must yield to that which is supreme. Brown v. Maryland, 25 U. S., 12 Wheat., 448.

* * * * * *

It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state.

* * * * * *

By the adoption of the Constitution, the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any state of the right to demand, as between it and the others, what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object."

Brennan v. Titusvill, 153 U. S., 300-303;

Covington v. Kentucky, 154 U. S., 209-223.

In the case of Inter Stat. Com. v. Brimson, 154 U. S., 470, the court reaffirmed the principle previously announced that:

"In the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulation, and not to a multitude of systems."

It was further said in that case (p. 473):

"Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that 'the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.' 17 U. S., 4 Wheat., 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to affect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. Un. Pac. R. R. Co. v. U. S., ('Sinking Fund Cases') 99 U. S., 700, 718."

In the case of United States v. Knight, 156 U. S., 11-12, it was said that:

"The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive

power to regulate it, it was left free except as Congress might impose restraints. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several states, and if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.

Gibbon v. Ogden, 22 U. S., 1 Wheat., 1, 210;
Brown v. Maryland, 25 U. S., 12 Wheat., 419, 448;
Thurlow v. Mass., 46 U. S., 5 How., 599;
Mobile Co. v. Kimball, 102 U. S., 691;
Borman v. Chicago & N. W. R. Co., 125 U. S., 465;
1 Inters. Com. Rep., 823;
Leisy v. Hardin, 135 U. S., 100;
3 Inters. Com. Rep., 36;
Wilkerson v. Rahrer (Re Rahrer), 140 U. S., 455, 555."

In the case of Gulf Ry. v. Hefley, 158 U. S., 104, the court said that:

"Clearly the state and the national acts relate to the same subject matter, and prescribe different rules. By the state act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading, and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without some time expositing itself to the penalties prescribed by the other. Take the case before us. If, in disregard of the joint tariff established by the defendant and the St. Louis & San Francisco Ry. Co., and filed with the Interstate Commerce Commission, the latter company, as a mater of favoritism, had issued this bill of lading at a less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law; while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict, the state law must yield. 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land.' (U. S. Constitution, Article 6, Clause 2.) It is no answer to say that in this case the defendant might have complied with both the state and the national statute; that it was a party to the reduction of the joint rate; that, therefore, the bill of lading was properly issued at 69 cents per 100 pounds; that it should have promptly notified its agents at every station of

such reduction; that if it had done so the agent at Cameron could have complied with the state as well as the national law, and that its negligence in this respect is sufficient ground for holding it amenable to the state law. The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield, and that one is the state law.

* * * * * *

Generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson v. Wickham, 92 U. S., 259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' New Orleans Gas Light Co. v. Louisiana Light & H. P. Mfg. Co., 115 U. S., 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of

Federal authority, as defined by the Constitution, the latter must prevail.' Morgan's Louisiana & T. R. & SS. Co. v. Louisiana Board of Health, 118 U. S., 455, 464.

It is unnecessary to pursue this discussion further. The state statute and the national law operate upon the same subject matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact, under the power given to regulate commerce between the states. The state statute must, therefore, give way."

Rhodes v. Iowa, 170 U. S., 412-426.

In the case of Scranton v. Wheeler, 179 U. S., 160, it was said that:

"We think that the power to regulate commerce between the states extends not only to the control of the navigable waters of the country, and the lands under them, for the purpose of navigation, but for the purpose of erecting piers, bridges and *all other instrumentalities* of commerce which, in the judgment of Congress, may be necessary or expedient."

L. & N. R. R. Co., v. Eubank, 184 U. S., 38-43;

Kelley v. Rhoads, 188 U. S., 5-10;

Stock Yards v. Ry. Co., 192 U. S., 568;

Ry. Co. v. Murphy, 196 U. S., 203-206;

Houston & Tex. v. Mayes, 201 U. S., 327-331;

McNeil v. Ry. Co., 202 U. S., 558.

In the case of McNeil v. Southern Ry. Co., 202 U. S., 558, the court said:

"Not being called upon to do so, we do not pass upon all the general regulations formulated by the commission on the subject stated, but are clearly of opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce, and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right-of-way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations, and the subjecting to undue advantages by carriers engaged in interstate commerce.

The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved, was passed upon by the Circuit Court of Appeals for the Sixth Circuit in Central Stock Yards Co. v. Louisville & Nashville R. R. Co., 118 Fed. Rep., 113. The court in

that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce, and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company. In pointing out that if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 120):

'It is thoroughly well settled that a state may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar, we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.'"

The attention of the court is specially called to the first section of the Act of June 29th, 1906 (amended "Act to Regulate Commerce"), that:

"The provisions of this act shall apply to *any* corporation * * *, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad," * * * from one state to another, and that "the term 'railroad,' as used in this act, shall include

all bridges and ferries used or operated in connection with any railroad, and also *all the road* in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and shall also include *all switches, spurs, tracks and terminal facilities, of every kind, used or necessary in the transportation or delivery* of any of said property; and the term 'transportation' shall include cars and other vehicles, and *all instrumentalities and facilities* of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing or storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act* to provide and furnish such transportation, upon reasonable request therefor, etc."

And it is further provided that:

"Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate, upon reasonable terms, a switch connection with any such lateral, branch line of railroad, or private side track, which may be constructed to connect with its railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper,

such shipper may make complaint to the commission, as provided in section thirteen of this act, and the commission shall hear and investigate the same, and shall determine as to the safety and practicability thereof, and justification and reasonable compensation therefor; and the commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section, in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money."

If the decisions of this court, to which reference has been made, have left the question in any doubt, does not this last expression of Congress conclusively demonstrate that it was the intention of Congress to place every interstate carrier, together with all tracks, spurs, switches, cars, etc., *used* by such carrier, under the exclusive control and supervision of the Interstate Commerce Commission? If this is a correct interpretation of the Act of Congress, has the state, by mandamus, or otherwise, the right to direct the use, or manner of use, of any instrumentality of an interstate carrier? When the carrier becomes an interstate carrier, does it not at once, by virtue of the statute, become a federal agency? Does not "*all* the road *used*" by such carrier, and "*all* switches, spurs, tracks and terminal facilities, of every kind, *used* or necessary in the transportation of persons and property" from one state to another, and "*all* freight depots, yards and grounds *used* or

necessary in the transportation or *delivery* of any of said property," pass under the immediate and *exclusive* control and supervision of the Interstate Commerce Commission? Can any other reasonable or logical construction be placed upon the language employed by Congress in the statute? The words "*all*" of the instrumentalities "*used*" are most significant. Every mile of track "used,"—every "switch," "spur," or "terminal facility," "used,"—every "car," "depot," "yard," and the "grounds" "used" by an interstate carrier, are brought under the jurisdiction and control of the Interstate Commerce Commission. While Congress probably intended to except intra-state commerce,—that is, articles of barter and trade,—from the operation of the act, yet the interstate carrier, as such, and *all* instrumentalities *used* by it, are brought within the operation of the act, and under the jurisdiction and *exclusive* control of the Federal government.

Again, it is provided by the act (Sec. 20, 34 Stat., 593), that:

"The commission is hereby authorized to require annual reports from all common carriers, subject to the provisions of this act, and from the owners of *all* railroads engaged in interstate commerce, as defined in this act, to prescribe the manner in which such reports shall be made. * * * Such annual report shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the

surplus paid, if any, and the number of stockholders; the funded and floating debts, and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employes, and the salaries paid each class; the accidents to passengers, employes and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balance of profit and loss; *and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet.* * * *The commission shall also have authority to require said carriers to file monthly reports of its earnings and expenses. * * * The commission shall at all times have access to all accounts, records and memoranda kept by carriers, subject to this act, *and it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed and approved by the commission, etc.*"

This section of the law clearly shows that it was the intention of Congress, not only to regulate commerce between the states in its narrow and restricted sense, but to exercise exclusive supervision and control over the interstate carrier, and of every instrumentality "*used*" by such carrier. When the commission prescribes "the forms of accounts, records and memoranda to be kept by" such carriers, as it has done, it becomes "unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the commission."

In view of this most comprehensive legislation upon the subject, what jurisdiction, control or authority has the state over the interstate carrier, or any instrumentality "used" by it? Has not this question been firmly settled by this court in the cases of Crutcher v. Kentucky, 141 U. S., 56-62; Ry. Co. v. Inter. Com. Comm., 162 U. S., 184; Hooper v. Cal., 155 U. S., 652-653?

In the case last above cited, Mr. Justice White, while conceding that the right of a foreign corporation to do business within a state other than that of its creation depended solely upon the will of the state, said that:

"Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another, and engage in business therein, upon the federal nature of its business. As, for instance, where it has derived its being from an act of Congress, and has become a lawful agency for the performance of governmental or *quasi*-governmental functions, *or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority.*"

It will be observed that the court below bases its decision upon the case of Coe v. Errol, 116 U. S., 517-565 (Rec., p. 39), but that case has no application to the question involved in this case, as clearly shown by this court

in the case of Johnson v. S. P. Co., 196 U. S., 21-22,—in which this court said that:

"Another ground upon which the decision of the Circuit Court of Appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty, and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the east bound train was so late that it was found that the car could not reach Ogden in time to return on the next west bound train, according to intention, and it was, therefore, dropped off at **Pormonroty** —to be picked up by that train as it came along that evening.

The presumption is that it was stocked for the return; and, as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not 'an empty,' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employes is practically the same, and we agree with the observation of District Judge Shiras, in Voelker v. Chicago, M. & St. P. R. R. Co., 116 Fed., 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'

Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and Coe v. Errol, 116 U. S., 517, 29 L. ed., 715, 6 Sup. Ct.

Rep., 475, is cited as supporting that contention. In Coe v. Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and, in our judgment, it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

Hanley v. K. C. S. R.. R. Co., 187 U. S., 619-621;

Kelley v. Rhodes, 188 U. S., 1.

The only logical deduction from these authorities is that the character of the vehicles under consideration cannot and should not be determined by the destination of the commodity with which they are burdened.

Our contention is that, under the acts of Congress, and the decisions of this court, there is a broad distinction between merchandise which may, or may not, become interstate commerce, and the instrumentalities of such com-

merce—such as road "used," switches, spurs, terminal facilities, depots, yards, stations, etc., "used" by a carrier subject to the provisions of the acts of Congress. The movement of the merchandise under certain circumstances may be controlled by the state, but the instrumentalities of such a carrier necessarily, and at all times, are under the exclusive control of the Federal government.

THIRD.

The Court erred in assuming jurisdiction of said controversy in so far as it involved the instrumentalities in use by an interstate carrier, and the subject matter of interstate commerce.

The findings conclusively establish the proposition that three-fifths of the business involved in the controversy was interstate. The track, switches, spurs and cars were in the "use" of and owned by common carriers, subject to

the provisions of the act of Congress to regulate commerce, and the amendments thereto.

It is provided by such act (34 Stat., L. 584) that:

"If any common carrier shall fail to install and operate any such switch or connection, as aforesaid, on application therefor, in writing, by any shipper, such shipper may make complaint to the commission, as provided in section thirteen of this act, and the commission shall hear and investigate the same, and shall determine as to the safety and practicability thereof, and justification and reasonable compensation therefor, etc."

It seems that this question has been settled by this court in the case of Ry. Co. v. Abilene, decided on February 25th, 1907,—in which the court said that:

"The commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorney of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in conse-

quence of any such violation of the provisions of this act. * * *' (24 Stat. at L. 382, Chap. 104, Sec. 8, U. S. Comp. Stat., 1901, p. 3159.) Power was conferred upon the commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States, in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the commission."

* * * * * *

"That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S., 479, 494, 42 L. ed., 243, 251, 17 Sup. Ct. Rep., 896. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S., 184, 40 L. ed., 935, 5 Inters. Com. Rep., 391, 16 Sup. Ct. Rep., 700, 167 U. S., 479, 42 L. ed., 243, 17 Sup. Ct. Rep., 896."

The Interstate Commerce Act, and the amendments thereto, constitute a code of procedure as broad and comprehensive as the subject with which it deals. The order and mandate of the court below involves the tracks, spurs, switches, terminal facilities, cars, and other instrumentalities owned and "used" by two interstate carriers, viz: The Missouri Pacific Railway Company and the Atchison, Topeka & Santa Fe Railway Company. Nay, more,—it involves business and shipments exceeding in volume one and a half million dollars per annum,—three-fifths of which is found to be interstate. We find, therefore, that the court below has not only assumed jurisdiction and control of the instrumentalities "used" by carriers subject to the provisions of the act "to regulate commerce," but jurisdiction and control of interstate commerce itself. If the opinion and decision of the court below shall be carried out to its logical conclusion and result, the "regulation of commerce" will be thrown into endless confusion; and, although the question is one of national character, and importance, the states may divide the responsibility with the Federal government, and make orders and establish rules and regulations which will embarrass, and perhaps in many instances prevent, common carriers subject to the provisions of the acts of Congress, from complying with their duties and obligations, as prescribed by the express mandates of the Federal government.

In the case of Ry. Co. v. Interstate Com. Comm., 162 U. S., 940, the court said, referring to the Interstate Commerce Act, that:

"The scope or purpose of the act is, as declared in its title, to regulate commerce. It would therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject.

* * * * * *

It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories as that going to or coming from foreign countries. In a later part of the section, it is declared that 'the term "transportation" shall include all instrumentalities of shipment of carriage.'

Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that 'all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.'

The significance of this language, in thus extending the 'judgment of the tribunal established to enforce the

provisions of the act to the entire service to be performed by carriers,' is obvious."

Relying upon this decision of this court, and the most significant language used by Congress in the Interstate Commerce Act, we submit that the order of the court below was made without jurisdiction, and is an absolute nullity.

The fact that each, The Missouri Pacific Railway Company and The Atchison, Topeka & Santa Fe Railway Company, were and are interstate carriers being conceded and admitted, the Interstate Commerce Act fixed their status, and the status of the instrumentalities by each "used," as such, in the discharge of their duties to the public, and their obligations under the law.

FOURTH.

The Court below, by its judgment and order awarding a peremptory writ of mandamus, denied to the said Missouri Pacific Railway Company the equal protection of the laws, and compliance therewith would deprive said company of its property without due process of law, and without compensation.

The judgment of the court below is as follows (Rec., p. 30):

"This cause comes on for decision, and thereupon it is ordered and adjudged that the peremptory writ of mandamus prayed for by the plaintiff be *allowed*, and that judgment herein be entered against the defendant, and that the peremptory writ of mandamus be issued to the defendant, commanding it to immediately restore, resume and make transfer of cars loaded and unloaded from the line of the A., T. & S. F. Rly. Company, and to and from its mill

and elevator at the station and city of Stafford, in the County of Stafford, and State of Kansas, upon the request and demand of the plaintiff, and upon the payment of the heretofore customary charges therefor. And further commanding it to at once, and without delay, issue upon all shipments of grain by the plaintiff, Larabee Flour Mills Company, in car load lots, from its mill and elevator at said station, without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor."

The defendant is required and commanded to "immediately restore, resume and make transfer of cars loaded and unloaded, * * * upon the request and demand of the plaintiff, and *upon the payment of the heretofore customary charges therefor.*"

The Railway Company is required, by this sweeping order, to leave its own rails, right-of-way, with its own engines, and go on to the spur, switch or tracks of the Santa Fe Company, in the face of the finding of fact (Rec., p. 19) that:

"No part of the transfer track is owned by the Missouri Pacific, or on its right-of-way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or permit the other to use, the transfer track, or requiring either to place empty or loaded cars thereon, to be taken away or returned by the other.

In order for the Missouri Pacific to take cars from the transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary for it to go

entirely off its own track, and right-of-way, both in going after cars standing on said Santa Fe track, and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track, or of the right-of-way over which it passes."

It will be noted in this connection that the Santa Fe Company is not a party to this proceeding, and is in no manner bound by the order and mandate of the court.

It is provided by section 3 of the "Act to regulate Commerce" that the Act "*shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*" The mandate of the court below requires the Missouri Pacific Railway Company, "upon the demand of the plaintiff," to do that which, without the consent of the Santa Fe, would be unlawful, and a trespass, "*upon the payment of the heretofore customary charges therefor.*"

It is not permitted to make any other or different charge for the service of two dollars per car, "the heretofore customary charges" paid by the Santa Fe Company. The "heretofore customary charges" were not fixed by any act of the legislature, or by any state authority, but by an implied contract between the Missouri Pacific and the Santa Fe companies.

In the case of Ry. Co. vs. R. R. Co., 110 U. S., 680, this court said that:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, *in the absence of statutory regulations to the contrary*, determine for himself what agencies he will employ. * * * He may certainly select his own agencies, and his own associates for doing his own work."

In Central Stock Yards, etc., vs. Ry. Co., 192 U. S., 571, is was said that:

"The courts have no authority to dictate a contract to the defendant, or to require it to make one."

The court below, in its order, went to the extreme limit in prescribing and defining the duties of the Railway Company. The concluding part of the order and mandate is: (Rec., p. 30)

"And further commanding it to *at once*, and *without any delay*, issue upon *all* shipments of grain by the plaintiff, Larabee Flour Mills Company, in car load lots, from its mill and elevator at said station, without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor."

This part of the order and mandate is not based upon any finding of fact. On the contrary, it is found as a fact (Rec., p. 34) that:

"In no instance did the Missouri Pacific issue bill of lading, way bill or receipt, or present or collect for freight or switching charges."

"And the Santa Fe would take the cars, *bill them to their destination*, collect *all* freight, and pay the Missouri Pacific its switching charges."

In the opinion of the Court below (Rec., pp. 32-42), not one word is said with reference to any conditions in bills of lading issued by the Missouri Pacific, to the effect that it would not be "responsible for loss and damage;" but the *whole* controversy is treated by the court as purely a local switching service, and decided upon that theory; and yet, without a finding of fact upon which to base it, the court issues a mandate, in which it undertakes to prescribe the form of bills of lading which the Railway Company shall issue "upon all shipments of grain by the Larabee Flour Mills Company, in car load lots, from its mill and elevator at said station."

If this portion of the order refers to *shipments* over the Missouri Pacific, as contra-distinguished from cars switched on to the terminals of the Santa Fe, then most certainly the court's order applied to interstate shipments, for it is found, as a fact, that the "Mill Company ships from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the state of Kansas, and into other states, etc. (Rec., p. 32), and that, "in receiving orders for furnishing, transferring or returning cars as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying

flour to points out of the state and cars intended to carry to points within the state of Kansas." (Rec., p. 34.)

It is provided by section 20 of the Act of Congress, as amended June 29th, 1906, that:

"Any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

And by the same section it is provided that:

"The circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the Commission alleging a failure to comply with or a violation of *any* of the provisions of said Act to Regulate Commerce, or of any Act supplementary thereto, or amendatory thereof, by any common carrier, to issue a writ or writs of mandamus, commanding such common carrier to comply with the provisions of said Acts, or any of them."

By this, Congress has prescribed the duty and provided a remedy, and designated the tribunal. As applied to interstate shipments, the order of the court denies to the Railway

Company the equal protection of the law, and is not due process of law. If applied to only intra-state shipments, the court had no jurisdiction, as the Railway Company was an interstate carrier, and, as such, subject to the provisions of the "Act to regulate Commerce." If incorrect as to the last proposition, then the Railway Company had the right, at common law, to limit its liability.

Hart vs. Penn. R. R. Co., 112 U. S., 331;

and the court below had no right or power to control its action in the premises by the extraordinary writ of mandamus.

Again, it is provided by section 6 of the Act, as amended, that:

"Every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements or *arrangements* with other common carriers, in relation to any traffic affected by the provisions of this act to which it may be a party."

This includes any "contract, agreement or arrangement" between the Santa Fe and the Missouri Pacific Companies relative to the handling or switching of cars from or to the transfer track.

By section 23 of the Act (March 2nd, 1889), a specific remedy is given the shipper, by proceedings in the district and circuit courts of the United States, "by writ or writs

of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

Each of the common carriers involved in this controversy, being subject to the provisions of the "Act to regulate Commerce," were required to file with and make known to the Interstate Commerce Commission the arrangement with the Missouri Pacific Company, whereby the Santa Fe Company paid to it two dollars per car for services performed in handling the interstate shipments from and to the Larabee Mill.

It is provided by section 6 of the Commerce Act, as amended March 2nd, 1889, and June 29th, 1906, that:

"Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act, and permit and keep open to public inspection schedules showing *all* the rates, fares and charges for transportation. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and * * * shall also state separately *all terminal charges,* storage charges, icing charges, and *all other charges which the Commission may require, all privileges or facilities granted or allowed,* and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, *or the value of the service rendered to the passenger, shipper or consignee,*

* * * The provisions of this section shall apply to all traffic, *transportation* and facilities defined by this act."

And the term "transportation," as defined by the Act (Sec. 1) includes "cars and other vehicles, and *all* instrumentalities and facilities of shipment or carriage, etc."

Can there be any escape from the conclusion that this terminal or transfer charge of two dollars per car, *in any event*, so far as applied to the "three-fifths" of the shipments, which were interstate, was under the control and subject to the approval of the Interstate Commerce Commission? If the Santa Fe paid it to the Missouri Pacific Company, without complying with the requirements of the Act, it was unlawful. If it exacted it from the shipper or consignee, it violated the law. If it did not exact it from the shipper or consignee, after it had paid the charge to the Missouri Pacific Company, its failure or neglect so to do would be a concession or rebate, which is expressly prohibited. The Missouri Pacific Railway Company, being a carrier subject to the provisions of the Act, could not handle any cars for the Santa Fe Company intended for interstate shipment for two dollars per car, without such charge was filed with the Commission and approved.

It is provided by the Elkins Act, as amended June 29th, 1906 (Sec. 1), that:

"The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates *and charges*, as required by said Acts, or strictly observe such tariffs until changed according to law, shall be a misdemeanor. * * * Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant or give, or solicit, accept, or receive any such rebate, concession, etc., * * * shall be deemed guilty of a misdemeanor."

Every charge made by any carrier subject to the provisions of said Acts, for *any* service performed (at least in connection with any interstate shipment) is an unlawful and prohibited charge, unless filed and published by the Acts referred to; and yet, the mandate, order and judgment of the court below requires and commands the Missouri Pacific Railway Company to "immediately restore, resume and make transfer of cars loaded and unloaded *from* the line of the Atchison, Topeka & Santa Fe Railway Company, to and from its mill and elevator at the station and city of Stafford, in the county of Stafford and state of Kansas, upon the request and demand of the plaintiff, and upon the payment of *the heretofore customary charges therefor*"

Would this order and judgment be a valid defense, if the Missouri Pacific Railway Company should be prosecuted for a violation of the provisions of the Acts to regulate commerce? Clearly not. If, therefore, the Missouri Pacific Company obeys the mandate of the court below, and resumes the service for the "heretofore customary charges,"

it subjects itself to prosecution and severe penalties for a flagrant violation of the Interstate Commerce "Acts." If, on the other hand, it refuses to obey the mandates of the court below, it subjects itself to proceedings and punishment for contempt. Does not this anomalous condition deny to the Railway Company the equal protection of the law?

FIFTH.

Said Court, under the Constitution of the State of Kansas, and the Constitution and Laws of the United States, had no jurisdiction of said controversy.

It is provided in Section 1 of the Act to regulate commerce, as amended on June 29th, 1906, that:

"Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of

property *wholly* within one state, and *not* shipped to or from a foreign country from or to any state or territory, as aforesaid."

From the context of the entire section, the conclusion is irresistible that, by this proviso, Congress meant to withdraw from the operation and effect of the Act *only* the articles of intra-state commerce, "*wholly* within one state, and *not* shipped to or from a foreign country, from or to any state or territory," as contra-distinguished from the carrier itself.

The term "railroad," as used in the Act, includes "*all* the road in *use* by any corporation." If the carrier is an interstate carrier, then "*all* of the road in *use*" by it necessarily comes under the operation of the Act, even though such road may be "used" by the same carrier for intra-state business; and also "all switches, spurs, tracks and terminal facilities, of *every* kind, used or *necessary in the transportation of the persons or property designated*" in the Act; and also "*all* freight depots, yards and grounds *used* or necessary in the transportation or delivery of any of said property, etc."

If it be conceded that a state may fix and regulate the rates to be charged for intra-state business, is it not apparent that it was the intention of Congress, by the Act to regulate commerce, as amended June 29th, 1906, by express

provision, to exclude the states from any power or authority to regulate or control any of the instrumentalities *used* by any carrier subject to the provisions of this Act?

The question is one of national character and importance, and has not this court, in the many decisions referred to, repeatedly and consistently adhered to the principle that "where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it, and provide the needed regulations;" "that the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."

It may admit of some doubt whether the proviso to Section 1 of the Act, as applied to interstate carriers, is within the constitutional powers of Congress, for this court has said (140 U. S., 555) that:

"It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state." (156 U. S., 104.)

It is provided by section 6 of the Act, as amended June 29th, 1906, that:

"The provisions of this section shall apply to all traffic, transportation and *facilities* defined in this Act."

Hence, we contend that *all* the road *used* by any interstate carrier, and *all* of its cars, switches, spurs, terminals, depot and station grounds, are, by the express provisions of the Act of Congress, placed under the regulation, supervision and control of the Federal Government, and belonging to commerce; and, as said by this court (125 U. S., 290):

"That which does not belong to commerce is within the jurisdiction of the police powers of the state; *and that which does belong to commerce is within the jurisdiction of the United States.*"

The roads "used" by an interstate carrier, its switches, spurs, tracks and terminal facilities, and *all* freight depots, yards and grounds *used* or necessary in the transportation or delivery of property, etc., belonging to commerce, are within the jurisdiction of the United States, by force of the Constitution and the Act of Congress passed in pursuance thereof, and therefore necessarily the power and jurisdiction of the state is at an end,—for this court has said (102 U. S., 702) that:

"There can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt the system. *Action upon it by separate states is not, therefore, permissible.*"

There is not an interstate carrier in this country that is not embarrassed, in the discharge of its duties and obliga-

tions, under the Act to regulate Commerce, as amended June 29th, 1906, and other acts amendatory thereof, in its efforts to observe the requirements of Congress, and the Interstate Commerce Commission, and, at the same time, follow the rules and regulations of some state commission, or state authority. For instance, and by way of illustration,—the Board of Railroad Commissioners of the state of Kansas has issued and promulgated an order requiring each, the Missouri Pacific Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company and the Union Pacific Railway Company,—all interstate carriers, and some operating transcontinental lines,—designating Kansas City, Kansas and Argentine, Kansas, "as freight terminal points;" and within ninety days, to "construct and maintain freight depots and freight terminal facilities from their respective lines within Kansas City, Kansas, and Argentine, Kansas, as their lines may run, sufficient to accommodate the needs of shippers on their respective lines, and accept consignments, and bill and freight offered by shippers on their respective lines to such terminals at Kansas City, Kansas, and Argentine, Kansas."

If this order is not complied with, the carriers are subjected to severe penalties, and the officer or agent violating the order may be fined one thousand dollars for each offense, and imprisonment for one year. (Session Laws of Kansas,

1907, pp. 438-440). If they do comply with the order, the terminals, "switches, spurs, tracks and terminal facilities so ordered by the Board of Railroad Commissioners of Kansas," and "*all* freight depots, yards and grounds used" in connection therewith, because each of said carriers are subject to the provisions of the Acts of Congress, at once come under the supervision and control of the Interstate Commerce Commission; and such carriers cannot lawfully make *any* charge for the use of "such switches, spurs, tracks and terminal facilities," except such as may be authorized by the Commission, and can keep no "account, record or memoranda," relative such "terminal facilities" required by the Kansas Board, except such as may be prescribed by the Interstate Commerce Commission. (Sec. 20 of Act.)

The Interstate Commerce Commission now has the power to make and prescribe a schedule of rates,—the reasonableness of which will depend largely upon the necessary expenses and disbursements of each carrier subject to the provisions of the Act of Congress. Would the large and unnecessary expenses incurred in order to comply with the order of a State Board be considered by the Interstate Commerce Commission in adjusting such rates?

The ingenuity of man can scarcely conceive of any function and power of a railroad company which has not been taken away, and vested in the Board of Railroad Com-

missioners. If such laws are valid, we need not worry about the problem of "government ownership" of railroads. If the state of Kansas owned every mile of railroad in the state, by indisputable title, it could not delegate to or vest in its own managers greater power than it has attempted to vest in the Board of Railroad Commissioners under the laws referred to. Ordinarily, under our theory of government, ownership of property carries with it the right of dominion over the same, and, within certain limitations, control of it. Not so in Kansas, so far as railroad companies are concerned. These companies have expended in this state many millions of dollars in permanent improvements, under the belief that they could exercise *some* supervision of and control over their property, and continue to aid and assist in the development of the wonderful resources of this great state. Constitutional guarantees have been swept away as idle vagaries, and these millions of dollars have been taken from the control of the owners, and placed under the exclusive management of a political agency, with powers so great as to startle and stagger the financial markets of the world. If the law of Kansas is constitutional in all of its provisions, a railroad company can make no rule fixing even the duties of a switchman or section hand which may not be cancelled and annulled by the Board of Railroad Commissioners. It can make no regulation as to the speed of its trains which is not subject to the pleasure, whim or caprice of the agency

which controls it. The Board of Railroad Commissioners has the power to require the destruction of every station house or depot, and the construction of others more commodious. It may require additions to the rolling stock of a company which has not a dollar in its treasury with which to pay the bill. Aside from financing the road, the executive officers of the company—the board of directors, the general manager—have no power in the management of the property that is not exercised in sub-ordination to the Board of Railroad Commissioners. This extraordinary supervision has been justified upon the theory that railroad companies may exercise the power of eminent domain, and yet, in the law under consideration (Sec. 5972, Genl. Stat. 1901), it is stated:

"*Any* person, upon written permission given by the Board, may exercise, *in the same manner and to the same extent as is now enjoyed by railroad companies*, the right of condemning and appropriating land, and laying out and constructing any spur, switch or railroad track thereon," etc.

In fact, the sovereign power of the state,—executive, judicial and legislative,—without restriction, is committed and delegated to the Board of Railroad Commissioners.

While the Commission Law of Kansas is not involved in this controversy, yet a perusal of that law, and a similar one in Nebraska and other states, will convince this court,

we believe, that it is utterly impossible for an interstate carrier to give allegiance to the requirements of the Acts of Congress, and, at the same time, observe and obey the many rules and regulations of these state commissions.

It was said by this court (Gibson vs. Ogden, *supra*), that: "*The power of the state must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence;*" and the power is complete in itself, and acknowledges "no limitations other than as are prescribed by the Constitution. *The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.*"

If it is unlawful for a state to impose any tax upon commerce between the states, as has been so often decided by this court (Penn. Tel. Co. vs. West Un. Tel. Co., 96 U. S., 1; Morgan vs. Parkans, 16 Wal., 471; Almy vs. Cal., 24 How., 169; Pickard vs. Pullman Co., 117 U. S., 34; 107 U. S., 59; 92 U. S., 259; 92 U. S., 275; Ferry Co. vs. Penn., 114 U. S., 196; Cox vs. Lott, 12 Wal., 204; 20 Wal., 577), would it not be equally unlawful for any state, by rule or regulation, to attempt to control or superintend any instrumentality of interstate commerce, especially in view of the fact that Congress, by its affirmative legislation, has covered the whole field of operation?

In the case of Sinnot vs. Davenport, 22 How. (U.S.), 227. Mr. Justice Nelson said that:

"If anything further could be necessary, we might refer to the enrollment prescribed by the act of Congress, by which it is made the duty of the owner to furnish, under oath, to the collectors, all the information required by this state law, and which is incorporated in the body of the enrollment. Congress, therefore, has legislated on the very subject which the state act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port.

It has been argued, however, that this act of the state is but the exercise of a police power, which power has not been surrendered to the General Government, but reserved to the states; and hence, even if the law should be found in conflict with the act of Congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of Gibbons vs. Ogden. The court, in answer to it, observed:

'It has been contended that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing forces.'

But, the court says, the framers of the Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with

the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislature as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the Act of Congress or treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. The same doctrine was asserted in the case of Brown vs. State of Maryland, 12 Wh., pp. 448-449, and in numerous other cases. (5 How., pp. 573, 574, 579, 581; 2 Peters, 251, 252; 4 Wh., pp. 405, 406, 436.)

* * * * * *

The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment.

This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrendered this power to the General Government; and, to the extent of the fair exercise of it by Congress, the act must be supreme."

In Gibbons vs. Ogden, *supra*, the Court says: (p. 229, 22 How.)

"It has been concluded that, as the word 'regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted."

In Houston v. Moore, 5 Wheat., the court says:

"We are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be "effectual, and at the same time compatible with one another."

In Prigg vs. Commonwealth of Penn., 16 Pet., 617, the language of the court is:

"If Congress have a constitutional power to regulate a particular subject, and they do regulate it in a particular manner, and in a certain form, it cannot be that the state legislature have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further

legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

West. Un. Co. vs. Pendleton, 122 U. S., 347;

Ill. R. R. Co. vs. Illinois, 163 U. S., 142.

In the case of Cleveland C. C. & St. L. vs. Illinois, 177 U. S., 515, the court approved what was said in Hall vs. De Cuir, 95 U. S., 485, in which it was said that:

"If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

Central R. R. Co. vs. Murphy, 196 U. S., 194,

R. R. Co. vs. Mayes, 201 U. S., 327.

From all these decisions of this court, and many more which might be cited, read in connection with the Act to Regulate Commerce, as amended on June 29th, 1906, the conclusion is irresistible that the order and mandate of the court below was and is a regulation of a carrier subject to the provisions of said Acts, and an attempt to control the instrumentalities of such carrier "*used*" by it in the discharge of its duties and obligations, as prescribed, defined and fixed by the Acts of Congress. The order and mandate is not justified upon the theory that it was but the exercise of the police power of the state, but upon the broad ground

that the movement of the cars sought to be controlled was intra-state commerce, and under the *exclusive* power of the state to regulate and control.

The conceded fact that the Missouri Pacific and Santa Fe companies were each interstate carriers, and their "tracks, road, switches, spurs and terminal facilities" necessarily involved in the controversy, was not considered a factor in the determination of this most important question. The court below, as has been shown, went further than to regulate the *use* and operation of the "road, switches, spurs, and terminal facilities," but made an order which absolutely fixed the charges for the service to be performed for all time to come.

Under this order and mandate, the Missouri Pacific Railway Company is left with no discretion in the premises as to such charges, but it must *continue* to perform the service, upon demand of the Mill Company, "upon the payment of the *heretofore* customary charges therefor;" and, notwithstanding the acts of Congress specially provide that *all such charges* must be filed with the Interstate Commerce Commission, and published, and approved by the Commission, the Supreme Court of Kansas, by its order and mandate, has superceded the mandate of Congress, and fixed and established a rate or charge which, if the order is valid,

cannot be changed, revised or modified, except by the court which made it.

Further, the court commands that the Missouri Pacific Railway Company shall "at once, and without delay, issue upon *all* shipments of grain by the plaintiff, Larabee Flour Mill Company, in car load lots, from its mill and elevator at said station, without the condition in bills of lading therefore, that *it is not responsible for loss and damage therefor.*"

It will be observed that there is no limitation or restriction to intra-state shipments, but applies to *"all shipments of grain by the plaintiff."* It *necessarily* applies to inter-state shipments, for it is found, as a fact (Rec., p. 32), that:

"The Mill Company ships from its mill over these two roads substantially its entire product,—three-fifths of which is so shipped out of the state, and into other states, etc."

Upon what possible theory, in view of the decisions of this court, and the mandatory requirements of the acts of Congress, can such an order be sustained?

It is provided by section 20 that:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such

property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

And the same section provides the remedy and designates the tribunal, in the following words, viz:

"That the Circuit and District Courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to Regulate Commerce, or of any Act supplementary thereto or amendatory thereof, by any common carrier, to issue a writ or writs of mandamus, commanding such common carrier to comply with the provisions of said Acts, or any of them."

The Supreme Court of Kansas, by its order, has assumed jurisdiction to prescribe rules and regulations as to the carrier, and the carrier's instrumentalities, which have been fully provided for by the Acts of Congress.

Again, the order and mandate of the court, in so far as it applies to the form of the bill of lading, and the charges or rates for the service to be performed in the future, is legislative or administrative in its character, and the order

with reference thereto not the exercise of any judicial function, and beyond the power and jurisdiction of that court, as heretofore determined by it in the cases of

State vs. Johnson, 61 Kan., 803-835;

Norwalk Co. Appeal, 69 Conn., 576;

Spencer's Appeal, 78 Conn., 301-309.

This court has uniformly held that a law conferring on the courts a power which is not a judicial power, within the meaning of the Constitution, is unconstitutional, and that such power cannot be lawfully exercised by the courts.

U. S. vs. Todd, 13 How. (U. S.), 52-53;

Ex parte Siebold, 100 U. S., 371-393.

The Supreme Court of Kansas, under the Constitution (Sec. 3, Art. 3, Genl. Stat. Kan., 1901, p. 44), is a court of limited and restricted jurisdiction. It can exercise no function that is not judicial. It has no legislative or administrative power. Any order of a legislative or administrative character is, by the Constitution of Kansas, committed to other departments of state government, and the order and mandate of the court below, in so far as it involves a legislative or administrative function, is beyond the power and jurisdiction of the court.

Kilbourne vs. Thompson, 103 U. S., 169.

In the above case it was said:

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into three grand departments,—the executive, the legislative and the judicial; that the functions appropriated to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriated to its own department, and no other."

State vs. Rogers, 71 Oh. St., 216;

People vs. Salisbury, 134 Mich., 544-552.

CONCLUSION.

The question in this controversy necessarily involves the respective powers of the state and federal governments. That the question is one of a national character no one will gainsay or deny. In a recent magazine article, over the signature of Theodore Roosevelt, President of the United States, it was said:

"We meet a peculiar difficulty under our system of government, because of the division of governmental power between the nation and the states. When industrial conditions were simple, very little control was needed, and the difficulties of exercising such control under our Constitution were not evident. Now the conditions are complicated, and we find it hard to frame national legislation which shall be adequate; while, as a matter of practical experience, it has been shown that the states either cannot or will not exercise a sufficient control to meet the needs of the case. Some of our states have excellent laws—laws which it would be well indeed to have enacted by the national legislature. But the widespread differences in these laws, even between adjacent states, and the uncertainty of the power of enforcement, result practically in altogether insufficient control. I believe that the nation must assume this power of control by legislation; if necessary, by constitutional amendment."

This is a question of great moment, but has it not already been settled by the various acts of Congress, so far as interstate carriers are concerned? As before stated, there

can be no joint regulation by the state and federal government of interstate carriers, without producing confusion and conflict. There must be, as often asserted by this court, a uniform system of regulation and supervision. It is idle to talk about state rights and state sovereignty, because the states have voluntarily surrendered to the federal government the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and "to make all laws which shall be necessary and proper for carrying into execution" the powers granted; and, in pursuance thereof, Congress has, by appropriate legislation, placed every interstate carrier, and all instrumentalities by it "used," under the exclusive control and supervision of a federal agency,—and to now permit the states, by judicial decree, or legislation, to resume the power voluntarily surrendered, would result in imperiling the stability of our government.

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Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

The Missouri Pacific Railway Company, Plaintiff in Error,
v.
The Larabee Flour Mills Company, a Partnership Composed of F. D. Larabee and F. S. Larabee, Defendant in Error.

No. [redacted]. 16.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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IN THE SUPREME COURT

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UNITED STATES.

The Missouri Pacific Railway Company, Plaintiff in Error, v. The Larabee Flour Mills Company, a Partnership Composed of F. D. Larabee and F. S. Larabee, Defendants in Error.	No. 585.

The facts in this case as found by the Commissioner appointed by the Supreme Court appear in the plaintiff in error's brief, and to such findings we refer in the succeeding argument, which shall be addressed mainly to the discussion of two questions which we contend are decisive of the case.

First. Did the switch proceeding from the Santa Fe line to the Missouri Pacific line and the spur of the Missouri Pacific proceeding from its track to the mill and the intermediate line of the Missouri Pacific constitute a local terminal facility impressed with a public use for switching purposes and subject to the regulatory power of the State of Kansas with reference to its operation?

Second. Or was such jurisdiction and control of the

State to regulate superseded and abrogated by the Hepburn act so that the above switching line became an instrumentality of interstate commerce subject to the exclusive jurisdiction and control primarily of the Interstate Commerce Commission, whose findings and determinations in that behalf could be reviewed only by the federal courts?

The Service Affected by the State Court's Judgment Purely Local and Intra-State.

It is found and not disputed that the lines constituting this switching service are wholly within the State of Kansas. It is found and not disputed that the Missouri Pacific Railway Company has been for a long time, and is now, furnishing said facilities to all industries located on the Missouri Pacific at Stafford, in or out, over the Santa Fe, for the switching of empty and loaded cars, with the single exception of the Milling Company. (See Finding No. 8.)

It must be conceded by the plaintiff in error that if the service required to be rendered is not an interstate service, the State courts may require it to be performed, unless by the passage of the act of Congress familiarly known as the Hepburn law, that portion of the Missouri Pacific track and the Santa Fe and Missouri Pacific spurs used for such switching have been appropriated as an instrumentality of interstate com-

merce and the operation, and all the incidents of the operation and control of such switching service, been thereby made exclusively subject to federal control.

To the two questions above stated and involved in the contentions of plaintiff in error we shall address ourselves in this brief and argument.

It is found as a fact and must be conceded upon this argument by both parties, first, that no bills of lading have ever been issued by either the Santa Fe or the Missouri Pacific including this service, but that it is a purely local switching service for convenience of the persons having industries along the line of the Missouri Pacific Railway. Second, that such switching service has for a long time been continuously performed by the Missouri Pacific Railway Company and for such service the Missouri Pacific has received all of the compensation, the Santa Fe exacting nothing for the use of the spur connecting its track with the track of the Missouri Pacific. That such switching service has to do not only with loaded cars from the Santa Fe that have reached their destination at Stafford and require only the facilities of delivery to the mill, which is on the Missouri Pacific track, to be ground up into flour, but also empty cars to be laden and transferred to the line of the Santa Fe for shipment.

The service, therefore, constitutes a purely local use for shipment in and out in carload lots of the products of all of the industries of Stafford along the line of the Missouri Pacific Railroad, and it is conceded that in the manner aforementioned the Missouri Pacific and Santa Fe Railroads have by the use of this switch, coupled with the use of the Missouri Pacific main line, held themselves out to the public generally as affording such local terminal facilities. It may be admitted that such terminal facilities for the delivery of wheat to the mill for grinding and the delivery to the Santa Fe of flour are a preliminary to the initiation of both intra-state or domestic hauls of flour or wheat and for interstate shipments as well. But it is found and must be admitted that such interstate shipment is completed by the Santa Fe when it places the cars upon its switch; and as to the cars returned, the interstate shipment is not initiated until the car reaches the Santa Fe depot and shipping orders are given and a bill of lading issued, and this is true as to both intra-state or domestic shipment and interstate shipment over the last mentioned line.

The placing of empty cars at the mill for loading by the Milling Company and the returning the same when loaded to the Santa Fe switch is to this effect; no more. It is purely a local facility whereby haulage

is obviated between the two railroads and is for the use and benefit exclusively in this respect of a public purely local; to wit, the citizens of the town of Stafford. Such service even where the business done over such a local facility is with reference to hauls of goods and passengers arriving on interstate trains, has been held by this Court as exclusively subject to State regulation.

The proposition is stated in the first clause of the syllabus of the case of the *State of New York ex rel. Pennsylvania Railroad Co. v. Knight*, 192 U. S. 21:

"Although a railroad company may be largely engaged in interstate commerce it is amenable to State regulation and taxation as to any of its service which is wholly performed within the State and not as a part of interstate commerce."

The court, speaking through Mr. Justice Brewer, in the opinion (p. 27) says:

"Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation."

Here, the service rendered by this switching privilege is contracted for, engaged and ultimately paid for as a distinct service; to wit, the service of hauling empty and loaded cars between two points wholly within the State, with a view exclusively to prepare for and initiate shipments which shipments ultimately

may be either domestic or interstate and to accomplish the delivery of like shipments. It is a separate service, separately contracted for, separately paid for and wholly local in its beginning and its end.

A like question was considered in the case of *Coe v. Errol*, 116 U. S. 517, quoted approvingly by Mr. Justice Brewer in the Knight case.

"It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary to the work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to another State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

Here it is established as a fact that the interstate

journey necessarily ended upon the Santa Fe switch and a special arrangement was made for its delivery at the mill with another railroad upon whose track the mill stood. And, further, that the cars from the mill were delivered under the same special arrangement at the depot upon the Santa Fe switch and such cars were not started upon their interstate journey, if perchance the shipment was to be interstate (and it might not be), until a bill of lading had been made out to a particular consignee outside of the State and the car or cars had been accepted for shipment by the Santa Fe Railroad and for the first time started upon their way.

Referring again to the case of *Coe v. Errol*, the court said:

"Though intended for exportation they may never be exported. The owner has a perfect right to change his mind, and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of the property of the State?"

The case of *Coe v. Errol* was followed and affirmed in the case of *Diamond Match Company v. Ontonagon*, 188 U. S. 84.

See also *Interstate Commerce Commission v. Detroit, Milwaukee & Grand Haven Railway Company*, 167 U. S. 633.

The question of what constitutes the beginning and the end of interstate railroad service, and the separable jurisdiction of the State and federal government in respect thereto, is to be found answered in a very recent case, viz: *Gulf, Colorado and Santa Fe R. R. Co. v. Texas*, 204 U. S. 403, which, by analogy, completely decides this case. We have established by previous decisions hereinbefore quoted that the rule as fixed by this court is that accessorial service, intended solely for the purpose of bringing the product or commodity to be transported to the depot and to initiate interstate shipment, constitutes no part of interstate service and is therefore exclusively, so far as it may be regulated or controlled, under the jurisdiction of the State; and when such interstate service ends within a particular State, the further dealing with that commodity and its shipment and movement to another place within the State in which the interstate shipment ceased is no part of interstate commerce, but is subject to State regulation and control. The terms of the consignment as expressed in the bill of lading and the transfer of the control for purposes of transportation to the transportation company seem to be the beginning of such interstate shipment and the receipt by the consignee at the point to which the commodity is billed seems to be the end of such ship-

ment. What is done thereafter within the limits of the State is of no concern to the authorities to whom are committed the regulation of interstate commerce. We quote for convenience and by way of argument from the syllabus of the court in the last mentioned case:

"An interstate shipment in this case of car-load lots, on reaching the point specified in the original contract of transportation ceases to be an interstate shipment, and its further transportation to another point within the same State on the order of the consignee is controlled *by the law of the State*, and not by the interstate commerce act."

It is found by the Commissioner in this case that of the business of the mill of the defendants in error three-fifths is interstate and two-fifths is intra-state or domestic; that is to say, that nearly one-half of the business in the doing of which the facilities afforded by this switching is necessary is business wholly within the jurisdiction of the State, being intra-state or domestic commerce. (See Finding No. 2.) It therefore appears conclusively that a large proportion of the business to be done over the switch at the request of defendant in error is within the regulatory power of the State exclusively from the beginning of that business to the end of it. And it follows as a necessary consequence that *quo ad* such business the State has a regulatory power and may as an incident to

such regulation declare the switching line by the conduct and acts of the owners thereof, to wit, the Santa Fe and Missouri Pacific Railroads, impressed with a public use and may direct that it shall be so used to the convenience of the public upon equal terms and for a reasonable compensation to the owners; that inasmuch as it is used to a greater or less degree for the transaction of intra-state or domestic commerce, it shall be kept open not alone for intra-state business, but for all business, because such business is indivisible. And jurisdiction in the respect of controlling its use for State business cannot be exercised by the State authorities to discriminate against its use for interstate business. The important question is, has the State a substantive interest in behalf of directing and controlling and regulating commerce within its jurisdiction entitling it to so regulate; such regulation, however, being necessarily limited so as to not interfere with or affect or in any way regulate its use for interstate commerce. It must be assumed that if its use be impartial as between the two elements of commerce, the federal authorities can have no possible reason to complain of State regulation.

The Judgment of State Court Not a Regulation of Interstate Commerce Within Meaning of Federal Constitution.

This very question as to the co-ordinate authority of such a facility was recently before the Supreme Court of the United States for its decision. We refer to the case of the *Wisconsin and Minnesota and Pacific R. R. Co. v. Jacobson*, 179 U. S. 287. This case in its facts discloses a more ample exercise of regulative power than in the case at bar. In the case at bar the court simply requires by its judgment that the Missouri Pacific Railroad shall afford switching facilities which it has for a long time furnished and which it still continues to furnish to many, and shall furnish such facilities to all alike and particularly to the Milling Company, defendant in error here. In the Jacobson case two intersecting railroads are required to provide for an interchange of business, to build tracks several hundred feet in length and if necessary condemn the land to build them on for the interchange of business between these two lines for the use and convenience of the public residing in the State; and concerning this judgment this court said (we quote from the syllabus):

"The providing at the place of intersection of the two railroads affected by this case ample ample facilities for transferring cars used in the regular business

of the respective lines and to provide facilities for conducting the business, while it would afford facilities to interstate commerce would not regulate such commerce within the meaning of the constitution."

The rule here asserted is to our mind completely decisive of this case, because the order by the court made here, even though it affects favorably the subject of interstate commerce, assuming for the sake of the argument that all of the business done by the defendant Milling Company was interstate, it would not be a regulation of such commerce within the meaning of the constitution.

By reference to the case of *Jacobson v. Wis. Minn. & Pac. R. R. Co.*, 74 N. W. (Minn.) 893, which is the same case as the case in 179 U. S., it will be seen that the court there held that even though it affected in its ultimate result interstate commerce, it also had relation to intra-state or domestic commerce; and that the jurisdiction of the State was concurrent with that of the federal government in making such orders in providing facilities for strictly domestic commerce. The Supreme Court in reviewing this case affirmed the Minnesota judgment, but found it unnecessary to put its affirmance upon the ground of approval of this proposition because it found that the law which was enforced and the particular instance of its enforcement, while it afforded facilities to interstate com-

merce, did not regulate it within the meaning of the federal constitution. If interstate commerce was not regulated in that case, *a fortiori* it is not regulated in this case.

See also the case of *Hopkins v. United States*, 171 U. S. 578, which in principle and by strong analogy holds to the same proposition.

Does the Hepburn Act Operate to Withdraw All Interstate Railroads from State Control?

It appears therefore from the foregoing cases that the State Supreme Court of Kansas was acting within its jurisdiction in declaring a line of railroad local to the State to be impressed with a public use and directing the method of its use as a common law duty of the railroad affected unless, as ingeniously and forcibly argued by the learned attorney for the plaintiff in error, the power to so order has been withdrawn from the courts of the State by the Hepburn act. It must be conceded that the decision of the State Supreme Court does not under the authority of the Jacobson case offer or tend to regulate interstate commerce, but it is contended that interstate railroads by the Hepburn act are separated and segregated and held in the exercise of their powers and duties to the public as instrumentalities of interstate commerce and as such instrumentalities the proper authorities of the

federal government under the Hepburn act are given exclusive control and that the State authority in that behalf is superseded, abrogated and withdrawn.

On page 37 of brief of plaintiff in error its learned counsel has frankly stated his position:

"If the 'power is co-extensive with the subject on which it acts,' then we submit that Congress, by and through the interstate commerce acts, has not only impliedly, but *expressly*, excluded every State from any interference with or control over any part of the instrumentalities of an interstate carrier, including its rails, equipment and instrumentalities used in the discharge of its duties to the public—except, perhaps, only the power of police regulation."

The statement here involves a naked question of jurisdiction made exclusive by the act of Congress undertaking in some of the clauses to deal with what he calls the "instrumentalities" of interstate commerce for purposes of regulation; that thereby any part of these "instrumentalities" operating within a State and handling the subjects of domestic commerce cannot be interfered with, regulated, or in any wise affected physically or otherwise, by the authority of any State with reference to such domestic commerce, because the lion's paw has been laid upon the entire railroad as a federal "instrumentality." It is assumed that the exigencies and conveniences of interstate commerce require such exclusion and it is to be inevitably presumed from the fact of Congress legislating at all upon the

subject. This startling theory rests upon inference alone, because it must be admitted that nowhere in the act is any such exclusive jurisdiction asserted. The learned counsel does allow that the State might, perhaps, have the right to exercise police power over the railroads; nor does he deny the power of the State to tax, although a like inference might just as properly be indulged with refer- ce to the exclusion of even that power since the enactment of the Hepburn law. For if the power to tax is the power to destroy, and Congress has adopted the interstate railroads as instrumentalities within its peculiar protection and regulation, then the exercise of the supreme taxing authority might at any time be used to affect such instrumentalities and to destroy their efficacy. What the limit or measure of the conceded police power is we can only guess. Although such power even is conceded grudgingly, we assume that it might include matters like grade crossings, the use of proper locomotive stacks to prevent the setting out of fires, enactments relating to fencing of tracks and to prevent the killing of domestic animals and the like. But as to the operation of the railroads themselves within the boundaries of the State, or the facilities to be furnished for the use of the public of the State in the transaction of the business of domestic commerce or the

putting on of trains for the accommodation of such public and like matters, the State is without authority. Can this be the law?

If this inference is to be indulged, the State is without authority and there is removed entirely from its jurisdiction the right to fix rates for the performance of any service upon this instrumentality of commerce, even though this service might relate to intrastate or domestic commerce, because, as it may be forcibly argued, Congress has undertaken to regulate the interstate rates upon these instrumentalities, which power might be materially affected either to enlarge or diminish such rate by the terms of a local charge enacted by any State legislature. By the same token it might with like force be contended that the State is without power to impose liabilities upon the railroad for injuries to employes upon such so-called instrumentality within the limits of the State, because Congress has seen fit to legislate upon the subject and the State's jurisdiction in that regard is thereby destroyed. It is not enough to say that this involves the exercise of a police power and would be outside this rule, because of the right of Congress to legislate under its constitutional power over interstate commerce and the operation of its instrumentalities, then it must follow according to this inference that it must

be the sole judge of the extent of the exercise of such power and that as to all of the elements of such exercise its power to be effective must of necessity be exclusive.

There is nothing in the decisions of the Supreme Court upon the commerce clause of the constitution that warrants such inference, but on the contrary a sustained and unbroken line of decisions of the court appear to be to the contrary. The final expounder of the constitution is the Supreme Court of the United States. If as must be conceded the legislation of Congress over this subject-matter (viz: the interstate commerce) is exclusive, then by almost innumerable decisions the limits and boundaries of such legislation have been clearly and distinctly fixed by this court. But this argument as to the effect of the Hepburn act, outside of the plain and explicit terms of such act (because there is nothing in the language of such act to warrant the inference made by the learned counsel), is refuted by the simple proposition that the exclusive power of Congress to legislate over and touching the subject of interstate commerce is derived from the same federal constitution, which declares in effect the exclusive right of the State legislatures to legislate concerning commerce wholly within the borders of a particular State and not excepting any of

the so-called "instrumentalities" of commerce lying within such borders. The two powers are derived from the same source and are co-ordinate. If the Hepburn act in its purpose or necessary effect confers upon the federal authorities the exclusive regulation and control of instrumentalities used for the doing of interstate business, irrespective of their being also employed in doing an intra-state or domestic business, then that act is to that extent unconstitutional and void. Congress has no more right to segregate and appropriate to its exclusive jurisdiction and control the operation and use of instruments of intra-state or domestic commerce than the respective States by their legislatures have a right to exclusively appropriate control over such railroads. The fact that Congress sees fit to legislate on the subject of interstate commerce and incidentally to enact rules governing the operation of railroads in that behalf does not make such legislation paramount and exclude the power of the State to regulate such railroad or such instrumentality by appropriate legislation confining the operation of such law to transactions of domestic commerce within its own borders. The legislation of Congress cannot invade the exclusiveness of the jurisdiction of the State over its own domestic commerce any more than the legislation of the State can directly or indi-

rectly seek by any act to regulate or control interstate commerce.

The subject of commerce is not an *imperium in imperio* of federal legislation, but involves two distinct, independent and co-ordinate powers dealing co-ordinately with matters that lie within the province of each jurisdiction. That such assertion of the effect of the Hepburn act is not permissible is plainly to be gathered from the language of many decisions of the Supreme Court of the United States upon the subject. This tribunal has carefully and consistently again and again marked and preserved the boundary line between State and federal control, and we are confident that this court will no more permit Congress by any act to transcend this boundary than it will permit a State to invade the exclusive legislation of the national legislature.

For the convenience of the court we herewith quote brief extracts from a number of the leading decisions upon this point.

That the right of the State to the exclusive control of its own internal commerce is drawn from the constitution itself by the exclusive words "with foreign nations and among the several States and with the Indian tribes," appears from the language of Chief Justice Marshall in the leading case of *Gibbons v. Ogden*, 9 Wheat. 194, 195:

"The enumeration presupposes something not enumerated and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

And the constitutional provisions thus enunciated are beyond the powers of Congress to limit or affect.

Mr. Justice M'Lean in the Passenger cases, 7 How. 400, uses the following language:

"All commercial actions within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation. Congress have no more power to control this than a State has to regulate commerce 'with foreign nations and among the several States.' And yet Congress may tax the property within a State, of every description, owned by its citizens, on the basis provided in the constitution, the same as a State may tax it. But if Congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce and commerce among the several States, the regulation of which, with certain constitutional exceptions, is exclusively vested in Congress, no State can regulate."

In *Sinnot v. Davenport*, 22 How. 243, appears the following:

"The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several States. Beyond these limits the States have not surrendered their power over the subject, and may exercise it independently of any control or interference of the general government."

In the Trade-Mark cases, 100 U. S. 82, the court, after asserting the same principle of constitutional construction, says:

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

In the case of *Wabash etc. Rwy. Co. v. Illinois*, 118 U. S. 565, the court, speaking through Mr. Justice Miller, uses the following language:

"It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully

recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

In the case of *Hall v. DeCuir*, 95 U. S. 485, dealing with an act of the legislature of Louisiana which required that colored passengers should occupy rooms and carriages set apart for them exclusively, it was held by the Supreme Court that inasmuch as the Supreme Court of Louisiana had decided that this regulation affected passengers traveling outside of as well as within the State, the act was unconstitutional as being a regulation of interstate commerce.

In a subsequent case of *Rwy. Co. v. Mississippi*, 133 U. S. 587, this court, speaking through Mr. Justice Brewer and dealing with the statute of the State of Mississippi, which the highest court of that State had declared was limited in its operation to passengers traveling wholly within the State, said, referring to the decision of *Hall v. DeCuir*, above mentioned:

"That decision is invoked here; but there is this marked difference. The Supreme Court of the State of Louisiana held that the act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for the white persons. This court, accepting that construction as conclusive, held that the act was a regulation of interstate commerce, and therefore beyond the power of the State. . . .

So the decision was by its terms carefully limited to those cases in which the law practically interfered

with interstate commerce. Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determmined by Congress alone. In this case, the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the federal constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained."

To a similar effect is the case of *Plessy v. Ferguson,* 163 U. S. 537.

See also *Covington etc. Bridge Co. v. Kentucky,* 154 U. S. 209 *et seq.*

In the case of *The Daniel Ball,* 10 Wall. 564, this court, speaking through Mr. Justice Field, said:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State and does not extend to or affect other States."

See also *Geer v. Connecticut,* 161 U. S. 532.

See also the language in the case of *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 247:

"The views above expressed lead generally to an affirmance of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions —as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertance merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate."

In the foregoing argument we have considered, we think adequately, the two main propositions in the case: First, was the business done upon the switching line (so-called) controlled and affected by the decision of the Supreme Court of Kansas, interstate commerce? Second, does such decision involve a control of an instrumentality of interstate commerce, which, as alleged, was by the enactment of the Hepburn law, placed under the exclusive jurisdiction and regulatory power of the federal authorities?

We are fain to believe that by force of the decisions

hereinbefore stated we have clearly negatived both of these propositions, and it would seem a work of supererogation to further argue the case, and we would not do so if it were not for the earnestness with which the learned counsel presents his theory of the federal adoption of all interstate railroads as "instrumentalities" of interstate commerce and claims to deduce therefrom the necessity of controlling the operation of such instrumentalities exclusively. This deduction and denal of the right of any of the States through which this interstate railroad runs to regulate such railroad in any respect, even though such regulation in nowise affects interstate commerce, but tends to subserve the same, proceeds upon the assumption that such intrusion upon the exclusive federal right might at some time tend to conflict with and therefore embarrass the federal government in the administration and control of interstate commerce.

For the purpose of such argument it might be admitted that in this particular instance there is no regulation of interstate commerce, adversely or otherwise. It is a naked question of power here presented. Although such exclusive control is not given by the act, it is claimed that it follows from the necessity of the case. Granted that the exclusive control is not expressly given by the act, the right of legislation over

and the regulation of interstate commerce it is asserted warrants the passage of the act and the necessary appropriation of these instrumentalities by the federal government. And it is claimed that it would be highly inconvenient and tend to thwart the purpose of the act if the State should be permitted in any respect to share such power of regulation; and it must therefore be assumed that the federal authority over the operation of such agency of interstate commerce is exclusive.

The Question of Convenience.

In its last analysis the argument of the learned counsel is one which is termed in the language of the law, *ab inconvenienti.* Such argument assumes a necessity and admits an encroachment upon the asserted rights and powers of the State. It also involves another proposition, that there is nothing in the act to be found which excludes an appeal to the necessity or denies the paramount right to resort to encroachment. We quote from the concluding part of plaintiff in error's brief which states the gist of the learned counsel's proposition:

"There can be no joint regulation by the State and federal government of interstate carriers without producing confusion and conflict. There must be, as often asserted by this court, a uniform system of regulation and supervision."

This language discloses the fallacy which is the

genesis of this idea; namely, to assume an exact analogy in the power of Congress to regulate interstate commerce and the power granted by the constitution to Congress to establish a uniform system of bankruptcy. The fallacy consists in comparing subjects of congressional legislation which differ *toto coelo* as to their extent. Touching the subject of bankruptcy, Congress is given exclusive power and therefore when Congress shall see fit to legislate it has been consistently held that such legislation supersedes and sets aside all State bankruptcy and insolvent laws. In the absence of congressional legislation, such laws are permissible and enforceable, but when Congress acts such State enactments are *ipso facto* annulled. And that rests upon the plain ground of plaintiff in error's proposition, that there must be a uniform system of regulation and supervision of the subject of bankruptcy. There cannot in the nature of things be a divided control. Commerce, however, in the general sense, is one and integral, but by the constitution of the United States it is divided and classified into commerce among the States, with foreign nations and Indian tribes, and the residuary commerce which is wholly inland as respects the several States. Over the former the power of Congress is exclusive; over the latter the power of the States is equally exclusive. It is inconceivable as a

matter of law, to say nothing of common sense, that as to the means whereby such commerce is done and the methods whereby it is done, one exclusive power is paramount over the other exclusive power. It is a contradiction in terms. To assert such a proposition would be to thereby deny the exclusive right and power over the subject-matter of commerce to the power subordinated; namely, the States of the Union. It would be a clear invasion of the constitutional rights of the States. There can be no question of inconvenience which would warrant the exclusive appropriation by the federal government of the instrumentalities or agencies by which both classes of commerce is performed. If inconvenience results from this plainly divided exercise of exclusive power to one or the other, it is a necessary result of the constitutional plan of division. It does not follow that such inconvenience can be lawfully obviated by the absorption in whole or in part by one of the powers given control over a part of commerce of the power of the other exclusively controlling the residue.

The learned counsel in his brief asks the following question:

"If it be conceded that a State may fix and regulate the rates to be charged for any State business, is it not apparent that it was the intention of Congress by the act to regulate commerce as amended June 29, 1906,

by express provision to exclude the States from the power or authority to regulate or control any of the instrumentalities used by any carrier subject to the provisions of the act?"

This question clearly involves the assertion that Congress may limit the State's power of regulation to "regulating the rates to be charged for intra-state business." Of course, if this has been sought to be done by the so-called Hepburn act, it is in effect an amendment to the federal constitution to that extent. If the power to regulate intra-state or domestic commerce is unlimited and exclusive under a grant of the constitution of the United States, then it cannot be limited and affected by an act of Congress on any ground of inconvenience but must be accomplished if at all by an amendment to that instrument in the manner pointed out by it.

But the learned counsel overlooks another difficulty that would result from this forced deduction of his. The act confers upon a commission created by Congress the power to fix interstate rates. Whether Congress had such power is still unsettled and to our minds a somewhat doubtful question, but the right of Congress to delegate legislative power in this respect to an executive commission has not yet been presented to this court and may never be. But assuming for the purposes of the argument that the Hepburn act is con-

stitutional or may be so held by this court, it follows that it would be equally inconvenient to permit the States to invade the domain of the rate-making power by their legislatures or by legislative commissions, or otherwise, because it is plain that the exercise of such power by the States may and often does affect the uniformity and finality of interstate rates.

It would seem, therefore, to follow, if plaintiff in error's contention is right, that by the Hepburn act the rate-making power is also withdrawn from the State *quo ad* intra-state or domestic commerce. In fine, to carry the argument to its logical conclusion, the Hepburn act might be said to abrogate and destroy the power of the States over all their domestic commerce carried on over interstate railroads.

But an examination of the Hepburn act shows that those who framed it and aided in its enactment had no such purpose. The saving clause in the first section, which the learned counsel seeks to confine in its operation to the exercise of police power, shows that Congress had no such purpose in making this law, and we will here quote it again by way of emphasis:

"Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage and handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or territory as aforesaid."

Clearly, the leaving to the State the determination of the elements of commerce here enumerated, to wit, the transportation of passengers and property, and the receiving, delivering, storage or handling of the same, carries with it as complete a control over the instrumentalities of commerce with reference to that which is domestic and intra-state exclusively as the federal government could possibly claim to have with reference to the use of such instrumentalities in the doing of an interstate commerce. What is the purpose of the court's judgment and order in this case? It is merely to regulate and control the use of such instrumentalities and facilities wholly local to this State with reference to the convenience and comfort and proper use of those engaged in intra-state or domestic commerce. It is conceded here that two-fifths of the property which shall use such facility involves intra-state or domestic shipments only. The plain and inevitable inference from the constitution, therefore, is that the State through its proper authorities, one of which is its highest court, may interfere so as to regulate the use of this subordinate instrumentality, a switch, to convenience this local commerce and to subserve the best interests in that behalf, of the people of the State.

The true solution of the question of inconvenience so earnestly urged by the learned counsel is that, in the

respect that such instrumentality is in the common use of both elements of commerce, either jurisdiction may regulate and enforce the use of such instrumentality justly to the convenience of one branch of commerce, in so far as it may be done without substantially infringing the right and convenience of the other branch or division of commerce and that every such use or every order made by respective State and federal authorities concerning the same rests for the determination of its rightfulness under the law upon the particular facts and circumstances attending it. This, owing to the existence of the two classes of commerce and the divided and exclusive power respectively over each, may involve some friction and inconvenience which must be borne patiently as an unavoidable incident to such divided dominion, but it cannot be obviated and set aside by abolishing one exclusive jurisdiction in whole or in part and giving the other exclusive control over the subject-matter of such commerce in any particular.

There might be some substantial ground for the complaint of plaintiff in error to the judgment of the court if the effect of such judgment was to thwart or interfere with or otherwise regulate the use of such part of this instrumentality as is involved in this switch with reference to the doing thereby of an interstate

business, but this it does not do. It seeks only to provide for the common and unimpaired use of a facility purely local to the State, upon terms of equality to all shippers alike, whether State or interstate. There is nothing involved in this decision of the highest court of Kansas which even remotely suggests either in its purpose or effect the regulation of interstate commerce. Certainly we have demonstrated that more is involved in State regulation of its own commerce than fixing the tariff at which it may be carried. The State is not bound to and cannot call upon the federal government to impose a regulation upon such instrumentality that will be a convenience to the public of a State with reference to the commerce wholly within the State. It cannot be denied, however, that it is its duty to so regulate when called upon. To do this the State must be left free as the federal government is left free in that behalf. But if, as we have suggested, as necessarily incident to State regulation, interstate commerce is impinged upon and substantially affected, such legislation *quoad hoc* is nugatory and void. This is and must be declared the boundary of the exclusive power of the federal government under the Hepburn act.

The exclusive power of the federal government as to interstate commerce remains the same as it was before the Hepburn act was passed. That act cannot

supersede the constitution and whittle down and limit the powers of the State necessarily exercised within a grant of power derived from that same constitution in furtherance of the commerce clause under which the Hepburn law was enacted. There is, as Judge Miller said in the Wabash case, "and there can be no doubt about it," a commerce wholly within the State not subject to congressional power. And as Judge Miller has also said, occasionally the lines of commerce, both State and federal, closely approach each other, so that it is difficult to distinguish between the one and the other. When such occasion of difficulty arises, however, it cannot be solved in favor of the one authority or the other by putting the instrumentalities of both kinds of commerce under one control to the exclusion of the other. That does not answer the requirement of the constitution, but tends to defeat and destroy it. And if this court shall adhere to its thousand times repeated interpretation of the constitution in that behalf, it will not be allowed in this case.

Nor can an argument in favor of the theory of exclusive federal control be predicated upon the theory of inferred powers under the constitution and outside of the express and enumerated powers of the constitution. This is a government of enumerated powers. It is true as a general proposition that all means necessary to the

carrying out of these enumerated powers exist in Congress within the fair implication of the powers granted, but such implications may not be used, however apparently needful and expedient they may seem to be, to annul a plain reservation from or limitation upon the exercise of such enumerated powers.

This Court has recently had occasion to discuss these very questions in the case of *Kansas v. Colorado*, 206 U. S. 80 to 93.

See also *Fairbanks v. United States*, 183 U. S. 283.

We have heard a great deal of late touching the suggestion of an easy method of amending the constitution of the United States by relaxing or obviating by interpretation its plain and imperative terms. This means the taking of power away from where it was placed by the framers of our government and putting it where they did not intend it to be. No plea of expediency from however high a source, no argument of inconvenience resulting from a claim of insufficiency to meet desired exigencies, can warrant or justify such suggestion. Such dealing with the constitution, thus setting aside its plain requirements by a false interpretation of its plain words by the great tribunal to which it is given finally to expound it, would be, if it were not unthinkable, in the highest sense treasonable and infamous. It would be a revolution consummated by

that tribunal to which is entrusted under the providence of God the ultimate guardianship of our liberties, and we rejoice to say is unthinkable.

The cases that the learned counsel cites in his brief in favor of implied exclusive control of instrumentalities meant to carry out a constitutional purpose have no reference to provisions of that instrument like the commerce clause. It may be admitted that for the purpose of the untrammeled exercise of a constitutional power and for that purpose only, and in the exercise of that purpose, Congress may have control of instrumentalities appurtenant to that purpose which the States cannot by legislation or judicial decision limit and affect, for the plain reason that the State would be thereby regulating and interfering with matters exclusively federal. But there is a far cry from this proposition to the proposition contended for here. These so-called instrumentalities, a word of recent coinage, are agencies and sole agencies for doing both kinds of commerce, and each jurisdiction is exclusive, independent and untrammeled in the control of such agency where such control appertains only to the particular branch of commerce subject to such regulation and does not intrude upon the other.

In Conclusion.

It appears substantially that, by long custom and usage, a switching line, consisting in part of a spur of the Santa Fe, and a small section of plaintiff in error's track has been used for switching purposes at a fixed price. The record reveals that it is still in use to every one except the defendant in error, upon the fixed price which is the usual and ordinary price for switching charges. The mandate of the court is that this shall be resumed so far as plaintiff in error is concerned and contined indefinitely, because by such use heretofore this section of the Santa Fe and Missouri Pacific tracks has been impressed with a public use. It is clear that this matter, if the court has thereby not regulated interstate commerce is a matter of purely local municipal law. The defendant is deprived of no property which it had before. It is not subject to any outlay for the maintenance of such switch for which it does not receive the usual recompense. Whether the customary charge of two dollars is reasonable or not is a matter which may be properly contested before the proper tribunal in the State, but there is no issue made as to the unreasonableness of this charge, and it therefore cannot be here tried and determined. The facts are not before the court on which it may be tried.

In the case of *Wisconsin, Minnesota and Pacific Rwy. Co. v. Jacobson*, 179 U. S. 287, above cited, it appears that the authorities of the State required not only the physical junction of the two roads for the convenience of the public in the interchange of business, but that for the attainment of such purpose they should construct at their own expense a line of railroad outside of the two lines to be united, several hundred feet in length, and incidentally, where the line left their right of way, to purchase or condemn land to the accomplishment of the purpose sought to be enforced. And yet this court, speaking through Mr. Justice Peckham, said that although the business to be carried over this line so to be built was in a large part interstate business, this was not a regulation of interstate commerce. If this be true, the foregoing complaints seem, we respectfully submit, to be not only groundless but frivolous, and beyond the purview of this court's consideration.

See also in this connection *Jacobson v. Wisconsin, Minnesota & Pacific Rwy. Co.*, 74 N. W. (Minn.) 893.

Of course, we are clear in our mind that this court will not prevent the State from carrying out such order upon the ground that the railroad physically in all of its parts has been assumed exclusively to federal

control and the court is without power to enter such judgment.

All of which is respectfully submitted.

W. H. ROSSINGTON,
CHARLES BLOOD SMITH.

WATERS & WATERS,
Of Counsel.

NO. 16.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

THE LARABEE FLOUR MILLS COMPANY,
DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

(Filed by consent.)

The application by the Mills Company for the writ of mandamus, embraced in the relief sought its issuance for two purposes; first, to compel the railway company to restore the traffic over the switch, and second, to require it to issue bills of lading without certain designated obnoxious clauses. Twenty-four days before the final trial, the Mills Company filed in the Supreme Court of Kansas and in this case, the following withdrawal:

> "The plaintiff respectfully withdraws from the consideration of the court, that part of the application for the writ of mandamus to compel the defendant to issue certain bills of lading, leaving as the one issue to be tried the resumption of switching service by the defendant over the transfer track of the defendant."

And, finally, as completely eliminating that matter from the discussion and decision in this case, there was filed in this cause, on April 20th, 1908, the following stipulation of the parties:

> "By and with the consent of the court, it is hereby stipulated, that the following clause in the Journal Entry of Judgment found on page 30, of the printed transcript of the record, to-wit:
>
> 'And further commanding it to at once and without delay issue upon all shipments of grain by the plaintiff, Larabee Flour Mills Co. in car load lots from its mill and elevator at said station without the condition of bills of lading therefor, that it is not responsible for loss and damage therefor.'
>
> is hereby withdrawn and the same is not to be considered by the court, and the motion to correct the record by the defendant in error is accordingly withdrawn. It is further stipulated, that the hearing of this cause is to be continued to the October term, 1908; each party having permission to file additional briefs herein on or before October 1st, 1908, and to be served by that time on the other party."

In the Supreme Court of Kansas it was argued that the service commanded was intrinsically and essentially an interstate commerce service, and elaborate argument

was made on behalf of the Railway Company to support that contention. In all the argument made by it there, the proposition announced by it here, that an interstate commerce carrier was in all things beyond the control of the state, was not hinted at in the most remote way.

The record of the testimony is not brought here, but the findings of the commissioner are. The findings show that the Santa Fe built a switch track connecting its track with the track of the Missouri Pacific and by an arrangement between these two roads, a reciprocal switching service was provided, for any one desiring it, and which is still continued to the use of everybody except the Mill Company, at two dollars per car; one of these roads would send its engine over the switch on to the track of the other, get the car and take it over to its own line, set it in to some one of the mills or industrials on its track to load or unload and then return the car again into the possession of the other, and there the service ended. In no instance did the Missouri Pacific issue bill of lading, way bill or receipt. This custom has prevailed ever since the construction of that switch. The commissioner further found, as follows:

"*Ninth.*

"I find as a fact *that the Santa Fe and the Missouri Pacific hold themselves out and undertake to place for loading on the Missouri Pacific tracks* located on the Missouri Pacific line at Stafford, *all cars* furnished by the Santa Fe required for the shipment of freight in car load lots out over the Santa Fe; and also hold themselves out and undertake to

likewise place all loaded cars consigned over the Santa Fe to industries located on the Missouri Pacific at Stafford."

The Missouri Pacific became offended because the Mills Company would not pay a demurrage bill of $78.00 wholly unrelated to this switching service, which charges were declared illegal by the Supreme Court of Kansas, and it determined to apply to its most valuable patron coercive means to obtain such charges, and thereupon denied this particular service to the Mills Company, but continuing it to everybody else. The commissioner so found in his twelfth finding, and further found in such finding that,

> "The refusal to make such delivery was not based upon a claim that the compensation paid for the service was not satisfactory, nor upon a claim that any part of the service constituted a part of interstate commerce, nor upon a claim that the Missouri Pacific did not undertake to perform such service."

There was no proof where any of these cars had come from, or where they were going. The Supreme Court of Kansas in an unanimous opinion decided that there was no element of interstate commerce in such switching service and awarded the peremptory writ.

This court in the case of the *Pennsylvania R. R. Co. v. Knight*, 192 U. S., 28, has properly characterized the switching service performed by the Missouri Pacific:

"The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the journey itself. Until shipped or started on its final journey out of the state, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

"As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation why is not the porter who carried the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce, and where will the limit be placed?

"We are of opinion that the cab service is an independent, local service, preliminary or subsequent to any interstate transportation."

The Missouri Pacific had no arrangement with the Santa Fe for an interstate journey; they united in no rate, established no joint tariff, and there was nothing done that made it become an interstate haul.

If, as the railway company has asserted, this was an interstate service, the burden was on it to show it by proof, and in the absence of such proof, the service having been commenced and ended in a city of Kansas, far interior, this court has not only said that the presumption would be that it was an internal service, but that there is no presumption that a transportation when commenced is to be continued beyond the state limits.

Pennsylvania R. R. Co. v. *Knight*, 192 U. S., 27,

Gulf, Colorado & Santa Fe Ry. Co. v. *Texas*, 204 U. S., 414.

The findings of the commissioner distinctly show that this was an independent, local service, of no more dignity than if a drayman had hauled the car from and to the Santa Fe depot.

In the brief of the Railway Company it complains of certain decisions made by the Supreme Court of Kansas. If there is no Federal question involved in this case, then such matters are not for discussion here, this court having no jurisdiction or power to investigate or render judgment.

When this case came here, the argument for the Railway Company assumed another guise; the argument

made by it in the Supreme Court of Kansas, that the particular service was interstate commerce, inherently, has been almost lost sight of, in the larger and more stupendous contention that when a railway company engaged in an interstate traffic, regardless of volume or amount, it becomes wholly under the control of Congress and the state has no power, in any way to regulate any of its concerns, business or instrumentalities; that it is beyond the reach of state legislatures, railway commissioners and courts.

In the face of the repeated decisions of this court, it would seem to require some degree of hardihood to present such a proposition to this court.

The learned gentleman believes in his own convictions and the writer through long years of intimacy with him, has unbounded confidence in him, and in wide limitations, his beliefs also. Were he to be successful, the peaceful calamity accomplished by him would be a greater revolution than the French accomplished with the tumbrel and knife.

This court in the case of the *Atlantic Coast Line* v. *N. C. Cor. Com.*, 206 U. S., 19, summarizes his contention as follows:

> "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business to state regulation, which may be exerted either

directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

And then follows this list of authorities:

C. B. & Q. R. R. v. *Iowa*, 94 U. S., 155;
Peck v. *C. & N. W. R. Co.*, 94 U. S., 164;
C. M. & St. P. R. Co. v. *Ackley*, 94 U. S., 179;
Winona & St. Peter R. Co. v. *Blake*, 94 U. S., 180;
Stone v. *Wisconsin*, 94 U. S., 181;
Ruggles v. *Illinois*, 108 U. S., 536;
Ill. Cen. R. Co. v. *Illinois*, 108 U. S., 541;
Stone v. *Farmers Loan & Trust Co.*, 116 U. S., 307;
Stone v. *Ill. Cen. R. Co.*, 116 U. S., 347;
Stone v. *N. O. & N. E. R. Co.*, 116 U. S., 352;
Dow v. *Beidelman*, 125 U. S., 680;
Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U. S., 386;
C. & G. T. R. Co. v. *Wellman*, 143 U. S., 339;
Pearsall v. *G. N. R. Co.*, 161 U. S., 645, 665;
L. & N. R. Co. v. *Kentucky*, 161 U. S., 677-695;
W. M. & P. R. Co. v. *Jacobson*, 179 U. S., 287;
M. & St. L. R. Co. v. *Minnesota*, 186 U. S., 257;
M. & St. L. R. Co. v. *Minnesota*, 193 U. S., 53;
C. B. & Q. R. Co. v. *Illinois*, 200 U. S., 561, 584;
Atlantic Coast Line v. *Florida*, 203 U. S., 256;
Seaboard Air Line v. *Florida*, 203 U. S., 261,

and to which we respectfully add:

Coe v. *Erroll*, 116 U. S., 517;
Int. Com. Com. v. *Brimson*, 154 U. S., 457;
N. O. & T. P. R. Co. v. *Int. Com. Com.*, 162 U. S., 184;
Rd. Co. v. *Int. Com. Com.*, 162 U. S., 191;
Osborn v. *Florida*, 164 U. S., 650;
Diamond Match Co. v. *Ontonogon*, 188 U. S., 82, 92;
Pullman Co. v. *Adams*, 189 U. S., 420;
Northern Sec. Co. v. *U. S.*, 193 U. S., 342;
Miss. Rd. Com. v. *Ill. Cent. Rd. Co.*, 203 U. S., 335;
Atlantic Coast Line v. *N. C. Com. Com.*, 206 U. S., 1;
The Employers Liability Cases, 207 U. S., 463.

In the case last mentioned the Act of Congress before the Court was declared void on the ground that Congress had attempted to legislate upon the internal commerce of the state and that the subjects within the power of Congress and without the power of Congress were so interblended as to be incapable of separation and the Act in consequence was held to be non-enforcible. If the contention of the railway company is tenable the decision in that case would have upheld the law.

The persistency with which the very distinguished gentleman urges this proposition has a tendency toward making us distrust the interpretation we have given to the decisions of this court, elaborated over and over again. We think, however, that section one of the Act itself

ought to be a full answer to all that has been said by him:

> "That the provisions of this act shall not apply to the transportation of passengers and property, or to the receiving, storage or handling of property, wholly within one state and not shipped to or from a foreign country from or to any state or territory."

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Office Supreme Court, U. S.
FILED.
SEP 25 1907
JAMES H. McKENNEY,
CLERK.

No. [redacted] 16.

In the Supreme Court
OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE LARABEE FLOUR MILLS COMPANY, a copartnership composed of F. D. LARABEE and F. S. LARABEE, *Defendant in Error.*

No. [redacted]

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CRANE & CO., TOPEKA.

In the Supreme Court
OF THE UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *vs.* THE LARABEE FLOUR MILLS COMPANY, a copartnership composed of F. D. LARABEE and F. S. LARABEE, *Defendant in Error.*	No. 585.

STATEMENT OF CASE.

THE Larabee Flour Mills Company instituted proceedings in mandamus against the plaintiff in error, in the Supreme Court of Kansas, to compel it to restore for the defendant in error a transfer of cars over the transfer track connecting the track of the Missouri Pacific, plaintiff in error, with the track of the Atchison, Topeka and Santa Fe Railway Company.

An alternative writ issued, to which a plea in abatement was filed, setting up that the Supreme Court of Kansas had no jurisdiction, that the matters in controversy related to interstate commerce, and that the United States Court had exclusive jurisdiction thereof.

This plea was demurred to, and after argument, the

demurrer was sustained. Thereupon the plaintiff in error answered, setting up in its answer the same matter and contention contained in its plea. A commissioner was appointed to take the testimony and report his findings of fact thereon, which he did. The case was then argued and submitted on the findings made by the commissioner, and the Supreme Court, upon briefs and oral argument, and after consideration of the same, gave judgment for the Larabee Flour Mills Company and against the Missouri Pacific Railway Company for costs and damages and directed the peremptory writ to issue requiring the Missouri Pacific to at once resume the transfer of cars for the Mills Company.

On the rendition of this decision this proceeding in error was instituted in this court, to reverse the judgment of the Supreme Court of the State of Kansas.

The plaintiff in error must depend solely and wholly upon the facts found by the commissioner in this proceeding, as they are all the facts embraced in the record. Such findings of fact are found in the printed brief of the plaintiff in error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

The contention of the Larabee Flour Mills Company, defendant in error, is that there is nothing in this controversy that presents any question arising under the Constitution or laws of the United States; that this court has

no jurisdiction; that the proceedings in error should be dismissed, and the judgment of the Supreme Court of Kansas affirmed.

While the plaintiff in error has been at great pains in its assignment of errors, to particularize, its contention can be more tersely stated as follows:

First: That this is an interstate commerce controversy. (See 1st, 2d, 3d, 5th, 6th and 7th assignments of error.)

Second: That the judgment of the Supreme Court of Kansas, requiring the Missouri Pacific to perform this service of transferring cars, destined to points outside Kansas, is depriving it of its property without due process of law, and contrary to the fourteenth amendment. (4th assignment of error.)

The sufficient reply is, that this controversy has nothing whatever to do with interstate commerce, and if this is true, it is not in violation of the Constitution of the United States; and there is no other question but what the Supreme Court of Kansas had the right to settle, and did settle, beyond any further inquiry by this court.

The Supreme Court of Kansas, in an elaborate, lucid opinion, concurred in by all of the seven judges, set out at length in record, held that there was no element of interstate commerce in it. There has never been a car transferred over this switch track that the Missouri Pacific ever billed, ever routed, ever participated or asked to participate

in the rate fixed afterward for the journey, and not a car that it ever knew where it was going to, in or out of the State of Kansas, and, so far as the record shows, never had the curiosity to inquire where it was going. We have been of the opinion *that the railway which has not yet been engaged in an act of interstate commerce, cannot claim the attention of the United States courts on matters of interstate commerce.* The Missouri Pacific was not only not engaged in interstate commerce in this switching business, but it was engaged in a local, intrastate service; it determined the service itself; how far it should extend; what it should do, and what the charge should be. It made an agreement with the Santa Fe that each would switch over this track; the charge was determined on, was posted in the local freight office at Stafford, of each of these railways, as a switching charge of two dollars for going onto the transfer track and setting the car into the Mills Company's track to be loaded or unloaded, and then returned into the possession of the other road; and the commissioner found in addition to this, that "the Missouri Pacific would place them "at the mill and when the cars were loaded, return them "to the transfer track, charge the Santa Fe two dollars "per car for the service, notifying it of the switching; the "Santa Fe would take the cars, bill them to their destina-"tion, collect all freight, and pay the Missouri Pacific its "switching charges. In no instance did the Missouri "Pacific issue bill of lading, way-bill or receipt, or present

"or collect bills for freight or switching charges." (5th Finding.)

When two roads make an agreement as to local switching facilities, there is no process by which it becomes affected with interstate commerce, so as to give the United States courts jurisdiction by reason of such agreement; and we may say further, that there is no interdict in the interstate commerce acts to prevent such an agreement being entered into; and no court of the United States would have jurisdiction to enforce, to enjoin, to change or modify such an arrangement, and that is the exact situation here.

The commissioner found as a fact that the only object or purpose of the Missouri Pacific in refusing to continue the traffic over this transfer track for the Mills Company of such empty cars was to compel the Mills Company to pay the demurrage charges on certain cars; that the refusal was not based upon a claim that the charge was not satisfactory, *nor upon a claim that any part of such service constituted a part of interstate commerce, nor upon a claim that it did not undertake to perform such service.* (12th Finding.) If, on all the questions of fact, the Missouri Pacific made no claim of interstate commerce in the State court, how can it seriously make such contention here?

It will be seen that this controversy was occasioned by an effort of the Missouri Pacific to collect demurrage charges on empty cars, about $78.00 in amount, which the Mills

Company resisted as unlawful and which the Supreme Court of Kansas held to be unlawful.

The commissioner's finding further shows that as to loaded cars, coming from the Santa Fe to be unloaded at the Mills Company's track, a switching service is still continued for it, and that from the time the transfer track was laid down until now, local switching service has been performed for everybody, with the one solitary exception, that the Missouri Pacific will not take empty cars from the Santa Fe, set them in to the Mills Company's track to be loaded and then returned; which is the controversy here.

It would seem that this court will be compelled to say that the Missouri Pacific made the situation; that it entered into an agreement for a local service. Under the laws of Kansas, Sec. 6478, Gen. Laws 1905, it is made the duty of railways to receive and transport cars of any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting, and for compensation it shall not demand any greater sum than is accepted by it from any other connecting railroad for a like service.

Stated tersely, the law of Kansas made it a duty to connect, made it a duty to perform this switching service, and made it a duty to charge for such service, the same

sum exacted by the Santa Fe. This sum was agreed on by each of these roads.

The contention will be pressed on this court, that for fear, in some apprehended but unseen way, some right under the interstate commerce acts may be intruded on if the judgment of the Supreme Court of Kansas is without limitation affirmed, that this court should limit its application so as to not interfere with the traffic of interstate commerce. Our sufficient reply is, that there is no interstate commerce in this case, and that it cannot metamorphose this controversy into one concerning interstate commerce, and that the United States courts as to this matter have no jurisdiction.

"The claim that a State statute, imposing a license tax, is void, because not sufficiently determinate, definite and certain in its character, does not involve a Federal question, and the determination of the State court is conclusive on this court."

Osborne v. Florida, 164 U. S. 650.

"But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view."

Pullman Co. v. Adams, 189 U. S. 422.

In the case of *Railroad v. Railroad*, 110 U. S. 667, this court decided that the provision in the Colorado Constitution that every railroad company shall have the right

with its road to intersect, connect with and cross any other railroad, only implied a mechanical union, and did not imply the right of connecting business with business; that at common law a carrier was not bound to carry beyond its own lines; and if it carries beyond it, *it may, in the absence of statutory regulations*, determine for itself what agencies it will employ.

In the case of *Railway v. Int. Com. Com.*, 162 U. S. 193, this court said:

"All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one State to a point in another, are received in transit by a State common carrier, *under a conventional division of the charges*, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce.

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded sound and adopted in other trades and pursuits."

Railway v. Int. Com. Com., 162 U. S. 197.
Int. Com. Com., 43 Fed. 37.
Same case, 145 U. S. 263.

"The mere fact that a railway wholly within a State and a vessel running between said State and another meet at a point within the railway State, and thus form a continuous line of transportation between the two States, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railroad and vessel must be operated or used under a 'common control' —a control to which each is alike subject and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

Ex parte Koehler, 30 Fed. 869.

". . . Then comes the clause relied on, as follows: 'But this shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in the same business.' The meaning of this clause is clear. It simply declares that the preceding provision of the section shall not be deemed to give the right to one carrier to use the tracks or terminal facilities of another carrier in the like business. It has reference to the act of Congress and nothing else. If the defendant company, by a contract with the City of Dubuque, has bound itself to allow other companies to use part of its tracks or terminal facilities, this clause of the act of Congress does not affect such a contract or the enforcement thereof. *So, also, if the State of Iowa has provided by proper statute that different companies may have a joint or common use of terminal facilities, the rights of the several companies to such joint use are not affected by the*

provisions of the interstate commerce act, but the same must be measured and determined by the statutes of the State."

Iowa v. Railroad, 33 Fed. 396, 397.
Bridge Co. v. Railway, 37 Fed. 567.
Railway v. Railway, 51 Fed. 465.
Railroad v. Railway, 59 Fed. 400, 403.
Railroad v. Railway, 41 Fed. 559.

"No power existed at common law, and none is given by the act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff."

Railway v. Osborne, 52 Fed. 915, 3 C. C. A. 347.
Express Cases, 117 U. S. 1.

"In the case of *Int. Com. Com. v. Railway*, 56 Fed. 925, the Circuit Court for the Northern District of Georgia held that where a company collects and retains its entire local rates on all freight shipped from Cincinnati to its local stations that there is no such arrangement as brings it within the interstate commerce acts; *held, further*, that the mere reception and continuous transportation by the Georgia Railway Company of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading and quoted through rates, does not constitute such an arrangement as is contemplated by the first section of the act, to regulate commerce, where the through rates so quoted allow to that company its full local rates; that there must be a common arrangement like a joint tariff before a new "line" is formed; and the line so formed under the joint tariff of connecting companies is one which is separate and independent from that of the connecting companies."

Railway v. Osborne, 10 U. S. App. 434, 435.

"And until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations

upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

Railroad v. Hughes, 191 U. S. 498.
Railroad v. Huber, 169 U. S. 614.
Smith v. Alabama, 124 U. S. 465.
Railroad v. Sloan, 169 U. S. 133.

Under the Interstate Commerce Act of 1887, the first section of that act declares:

"That the provisions of this act shall not apply to the transportation of passengers and property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any State or Territory."

In the recent Interstate Act, passed by Congress, and approved June 29th, 1906, that exact provision is re-enacted.

Section 3 of the Act of 1887 provides that every carrier shall afford all reasonable facilities for interchange of traffic between their respective lines and for receiving and delivering property to and from their several lines and those connecting therewith; *but this shall not require any carrier to give the use of its tracks or terminal facilities to another carrier engaged in the same business.*

This court will find the same provision exactly in Section 3 of the new Interstate Commerce Act, approved June 29th, 1906.

"Moreover, the direction 'to afford equal facilities for an interchange of traffic,' is controlled and limited by the proviso that this clause 'shall not be construed as requiring a carrier to give the use of its tracks and terminal facil-

ities to another carrier.' In the second place, it has been held that neither by the common law nor by the Interstate Commerce law, have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, or for joint through rates. *Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation.*"

Railroad v. Railway, 11 C. C. App. 421.

"It is urged, however, in substance, that although the court may be powerless to make and enforce agreements between carriers . . . for the use of each other's cars, tracks and terminal facilities, yet, that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier the law commands it to extend 'equal facilities' to all other connecting carriers if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, *and that this latter duty the courts would enforce.*

"It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, *which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier.* It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public and would only be a benefit to the complainant.

"Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right, before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them . . . for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence to refuse to enter into such an arrangement with any connecting carrier.

"In view of these considerations, we are unable to adopt a construction of the interstate commerce act which will practically compel a carrier, when it enters into an arrangement with one carrier for . . . the use of its tracks and terminal facilities, to make the same arrangement with all other connecting carriers, if the physical connections for an interchange of traffic are the same, and do this without reference to the question whether the enforced

arrangement is or is not of any material advantage to the public."

Railroad v. Railway, 11 C. C. App. 421, 422.

"In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred by the interstate commerce act."

Stock Yards Co. v. Railroad, 118 Fed. Rep. 113.

"*It is within the power of a State to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such lines of railroad. This may have been necessary for State commerce.*"

Stock Yards Co. v. Railroad, 118 Fed. Rep. 113.

"The provision in the third section of the act to the effect that a common carrier shall not be required 'to give the use of its tracks and terminal facilities to another carrier engaged in like business,' is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding and delivering of traffic to, from, and between connecting lines; and, therefore, it is left open to any common carrier to contract or to enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such line, or of discrimination against other carriers who are not parties to, or included in, such arrangements.

"No common carrier can, therefore, justly complain of another, that it is not allowed the use of the other's tracks and terminal facilities upon the same or like terms and

conditions which, under private contract or agreement, are conceded to other lines."

Bridge Co. v. Railway, 37 Fed. Rep. 567.

"Common carriers are there only required, according to their respective powers, to afford all reasonable, proper and equal facilities, for the interchange of traffic between their respective lines, and are forbidden to discriminate in their rates and charges between them; and even this provision is subject to the limitation that it shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Oregon Short Line v. Railway, 51 Fed. Rep. 465.

"It therefore is manifest that the Circuit Court has no power to grant the relief asked, unless it has power to command that the respondent shall contract with the complainant for such through routing, billing and rating, and not only so, but shall contract with the complainant therefor on the same terms that they have contracted with the Mallory line. All the reasons which have prevailed with Congress to withhold this power from the interstate commission, and many additional reasons with strongest force, forbid that the numerous Circuit Courts should, in advance of legislative action, take jurisdiction and by mandatory injunction compel such through routing, billing and rating."

Railway v. Steamship Co., 86 Fed. Rep. 422.

Drayage Co. v. Railroad, 65 Fed. Rep. 39.

"Not all preference is prohibited—only undue and unreasonable preference, and the facilities which are required to be granted have two limitations: they do not include tracks and terminal facilities, and they must be reasonable and proper."

Oregon Short Line v. Railroad, 61 Fed. Rep. 162.

"Of course, if appellant's construction of Section 3 be

correct, and it can compel appellee to receive one car, by the same right it may compel the receipt of many, *and what more would be necessary to take the use of tracks?* We think nothing."

Oregon Short Line v. Railroad, 61 Fed. Rep. 162.

"A court of equity has no power, either at common law or under the interstate commerce act, to compel a railroad company engaged in interstate commerce to enter into a contract with another company for a joint through rate and joint through routing of freight and passengers."

Railroad v. Railway, 41 Fed. Rep. 559.

Railroad v. Railroad, 3 Interst. Com. Com. 1.

"That the act to regulate commerce does not confer upon the commission authority to make an order affirmatively requiring a railway carrier to deliver car-loads of interstate freight to a connecting carrier."

Kentucky v. Railroad, 10 Interst. Com. Com. 173.

The courts have, with practical unanimity, held that the carriers are free to make arrangements of this sort by contract among themselves for local service, and that there was nothing in the act which authorized either the commission or the courts to compel one railroad company to deliver its cars to another. This is the substance of the decision in,

Kentucky v. Railroad, 10 Interst. Com. Com. R. 188.

In the case of *McNeill v. Railway*, 202 U. S. 563, this court says: "We do not intimate any opinion upon the "question pressed at bar as to whether an order which was "solely applicable to purely State business, directing a "carrier to deliver property upon a private track beyond

"the line of the company, would be repugnant to the due-"process clause of the Constitution," and with reference to this, we say, that the due-process clause has been taken out of any controversy here by the Missouri Pacific making its own charges; that there is no interstate commerce business in this controversy; that the Missouri Pacific by its own act has put it in the nomenclature of local, intrastate business; that the whole of this business was commenced and carried on under a verbal agreement of the two roads; that it is the express command of the State; and finally, after four years' use of this track for such purpose, this transfer track is affected not only with a public interest, but with a vested right in the Mill Company to its continuance.

We desire to also say that this controversy relates to intrastate commerce, and that the service demanded in no way prejudices, hampers or interferes with interstate commerce traffic as legislated upon and decided by the courts. If the contention of the plaintiff in error should be sustained, the State would be powerless to exercise any local control over a railway; its legislature could pass no law but what it would interfere with the interstate commerce acts; there could be no sort of local agreements but what would in some way be found to hamper or delay the proper execution of rights conferred by Congress and to be protected by the courts.

As to the other proposition, that when the Supreme

Court of Kansas required by its writ of mandamus that the Missouri Pacific should do this service, to leave its own rails and roadway and go on to the connecting switch of another railway and transfer cars, it would be a violation of the fourteenth amendment of the Constitution of the United States, in depriving it of its property without due process of law, we have this to say: That such a contention is a preposterous one in the face of the facts that the arrangement was made by the Missouri Pacific itself, and that such service is continuously rendered for everybody except the Mills Company, and that from beginning to end of this controversy, the price set by it was deemed satisfactory to it. The fact that it would have to leave its own right-of-way to get onto this transfer track, after it had agreed to do so and was continuing to do so for other people, is of no significance. It was remarked to one of the Missouri Pacific counsel, while making his argument, by one of the Justices of the Supreme Court of Kansas: "Have "you ever known a switch track but what one or the other "in using it must get off its own rails and right-of-way?" And to which he answered he had not.

Under the laws of Kansas, Sec. 6469, General Laws 1905, where two roads run parallel or cross, they are required to connect by switch, and the one which builds the switch may recover half the cost from the other railway, and they may maintain and operate the switch jointly. The facts found show the Santa Fe built this

switch, and from the time it was opened the two roads operated it jointly and reciprocally. This court, we claim, has no power to hear, to limit or modify that decision, or to do any other act or thing except to dismiss the proceedings in error, for want of jurisdiction.

The court upon reading the brief for the plaintiff in error will soon discover that the argument that this is an interstate commerce question, is based wholly on the extreme doctrine that where a railway is at all engaged in interstate commerce, that thereupon the right-of-way, track, bridges, culverts, crossings, cattle-guards, cars, engines, trucks, trains and employés, and all other instrumentalities of interstate commerce, are beyond the reach, good or bad, of State legislatures as to State commerce, and wholly within the jurisdiction of the United States courts. This is argued at pages 27, 28, 35, 37, 38, 40, 41, 44, 47, 48, 52, 62, 66, 67, 68, 69, 71 and 72 of their brief, and cases are cited to support such far-reaching contention.

The precise position of the other side, elaborated through the entire brief, is stated at page 27 of their brief:

"When a carrier becomes an interstate carrier and its rails and equipment used as an instrumentality of interstate commerce, *it passes under the exclusive control of Congress.*"

It is upon this argument that the other side claim that this is an interstate commerce question and none other. The contention has the one merit of pertinacity in its

presentation here. The decisions of this court are many where the State authority in all proper cases has been upheld. In this case, there is nothing but a local switching service, for a local charge, wholly within the limits of a country town in the State of Kansas; there is nothing in the transaction to suggest an interstate commerce controversy. It is claimed by the other side, that if the State is permitted to make laws and enforce them, requiring railways that cross each other's tracks, to construct switches and give reciprocal connection, that it would be an incubus on interstate commerce; an exaction that would delay or hamper interstate commerce; that at the very time such domestic service is being performed, an immediate interstate exigency might require the use of the switch, the engine, the crew and cars so used in making such local transfer; and to remedy such impediments it is urged that the United States laws and United States courts have complete and exclusive jurisdiction as to everything. When such a doctrine becomes the law, the State legislatures will be shorn of all power, except the thing locally transported. They can pass no law for the schedule of any train; the speed of trains through cities; the repair of substructures; nor can they demand repairs or require conveniences.

The contention is made all through the brief of the other side, that the business of transferring cars over this switch track is impressed with interstate commerce; there is no

foundation for such contention. The side-track is wholly owned by another railway; it is a local service, made so by both roads, for a local charge, and to all applicants; and denied absolutely to the Mills Company, and performed for all others indifferently and as they apply for the service. The Missouri Pacific has this local charge posted in its station at Stafford. It has never made an inquiry about the destination of any car for which it did this service. It never issued a bill of lading for one of them; it never was a factor or participant in any rate, fixed for the further journey of such cars. Upon the building of this side-track, the two roads entered into this agreement; beyond doubt, for the benefit of patrons of both roads; nobody else could profit or be benefited by such an agreement; and when patrons like the Larabee Mills Company transferred cars with either road under such an arrangement, built up their industries with a knowledge of its existence, and for years were in the exercise of the right to so transfer cars, it was, in essence, contractual rights between each of these railways and such patrons. Nor is this all; the twelfth finding of the commissioner declares, "that the refusal to make such delivery was not based "upon a claim that the compensation paid for the service "was not satisfactory, nor upon a claim that any of such "service constituted a part of interstate commerce, nor "upon a claim that the Missouri Pacific did not undertake "to perform the service." No agreement had ever been

made between these two roads to do any interstate business whatever; each was acting independently. There is a statute in Kansas that requires railroads to do this very service; it is a State duty, that the State has the right to compel. If there is no interstate commerce or Federal question involved in this controversy, there is no need to look for or argue anything decided by the Supreme Court of Kansas in this case, as this court, in such case, would have no jurisdiction.

In the case of the *Atlantic Coast Line Rld. Co. v. The N. C. Corp. Com.*, decided by this court and published in the Supreme Court Reporter, June 7th, 1907, this court upheld the order of the State commission requiring the train service of a connecting road to be made to accommodate the other connecting road. This train was evidently engaged in an interstate passenger traffic as well as performing a local service. This court held that the controversy was a State and not a Federal question. This case is not referred to in the brief of the other side.

In all matters of interstate commerce and as to them, the jurisdiction of Congress, of course, is supreme, so far as it has by law assumed to act. The mere grant in the Constitution, without law to enforce it, would be, we take it, no impediment for the States to assume such jurisdiction themselves. In all questions of domestic or State commerce, the State is just as supreme. Each in its sphere has the right to exist, and the right to be protected. It

is no worse to say that domestic commerce interferes with interstate commerce, than to assert that interstate commerce interferes with local commerce. The Constitution excludes the Congress from any direction, dictation or control of intrastate commerce. That power, having never been granted, does not exist. Surely, there was an unintentional ineptness of the distinguished counsel representing the railway company, when he asserted: "If "*handling intrastate business*, by an interstate carrier, "should prove to be a burden upon interstate commerce, "would not Congress have the right *to interdict and pro-* "*hibit it?*"

However voluminous and important interstate traffic may be, it will always be equalled by the local traffic of the States, and no exigency of a power conferred on Congress gives it the right drawn from any of the necessities of the situation to invade or trench upon as great a right lodged in the people. For Congress to interdict or prohibit State traffic, would be the usurpation of an ungranted power. A discussion of this proposition is absolutely useless. This court, in many decisions, has expressly and directly pronounced against this heresy urged by the other side, some of which we have cited.

"Whenever a separation in fact exists between transportation service wholly within the State and that between the States, a like separation may be recognized between the control of the State and that of the nation."

Railroad v. Knight, 192 U. S. 27.

Pullman Co. v. Adams, 189 U. S. 420.
Match Co. v. Ontonagon, 188 U. S. 82.
Osborne v. Florida, 164 U. S. 650.
Coe v. Errol, 116 U. S. 517.

There is this one and only proposition in their brief, and the repeated assertion of it, over and over again, through nearly half of the brief, might suggest, did we not know absolutely and certainly otherwise, that it was the effort of some far-visioned doctrinaire, attempting to convince himself of the truth of his own gendered fallacy. We do not understand how it is possible to be serious in such contention in the face of the decisions of this court, and in the very teeth of the interstate commerce act, which declares that the provisions of the act "shall not "apply to the transportation of passengers, storage or "handling of property wholly within one State and not "shipped to or from a foreign country from or to any "State or Territory as aforesaid." (Sec. 1.)

The single question that is before this court in this case, as we have urged before in this brief, is whether the transfer of the cars from the spur track of the Santa Fe Railway Company to and from the Larabee Mills by the Missouri Pacific Railway Company at Stafford, Kansas, was an interstate transaction, and if it was a purely local transaction the judgment below was right and should be sustained.

The facts were settled by the findings of the commissioner appointed by the Supreme Court of Kansas, those findings being conclusive upon this court. The question of the con-

clusiveness of such findings upon this court is forever settled by the case of the *Gulf, Colorado & Santa Fe Railroad Company v. The State of Texas*, 27 S. C. Rep. 360.

See also—

Dower v. Richards, 150 U. S. 658; s. c., 14 S. C. Rep. 452.

Egan v. Hart, 165 U. S. 188; s. c., 17 S. C. Rep. 300.

Thayer v. Spratt, 189 U. S. 346; s. c., 23 S. C. Rep. 576.

Adams v. Church, 193 U. S. 510; s. c., 24 S. C. Rep. 512.

Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220; s. c., 24 S. C. Rep. 632.

The findings of the commissioner, so far as applied to the one question before this court are as follows:

FOURTH.

"The lines of the Missouri Pacific and the Santa Fe intersect at a point one mile distant westwardly from the mill and the Missouri Pacific station, and the same distance from the Santa Fe station. As near as practicable to the intersection, the Santa Fe in the year 1903 constructed at its own expense a transfer track from a connection with its own to a connection with the Missouri Pacific line. At that point and for a half mile eastward the Missouri Pacific line is located in Prairie avenue, a public street of Stafford, and no part of the transfer track is owned by the Missouri Pacific, or on its right-of-way or private ground. No express contract is shown to exist between the two railroad companies requiring either to use, or to permit the other to use, the transfer track, or requiring either to place empty or loaded cars thereon to be taken away or returned by the other. In order for the Missouri Pacific to take cars from the said transfer track which had been placed thereon by the Santa Fe, or return such cars thereto, it is necessary

for it to go entirely off its own track and right-of-way, both in going after cars standing on said Santa Fe transfer track and in setting loaded cars on the same; the Missouri Pacific not owning and having no control over any part of the said track or of the right-of-way over which it passes.

FIFTH.

"Immediately after the construction of the transfer track the Santa Fe began to place thereon empty cars, to be by the Missouri Pacific taken therefrom and placed for loading with flour at the Mill Company's mill, or at such convenient position as to enable the Mill Company with its own force to place them at the mill for such loading. At the same time the Missouri Pacific began to take such empty cars from the transfer track and place them for loading with flour at the mill, or in such position as to enable the Mill Company with its own force to place them at the mill for such loading; and on notice that such cars were loaded ready for shipment, to return them to the transfer track to be taken possession of by the Santa Fe. The practice in this matter was, when the Mill Company desired to ship flour from its mill by the Santa Fe, it placed its order with the Santa Fe for the number of cars desired; the latter would place the cars on the transfer track; the Missouri Pacific would then place them at the mill, and, when the cars were loaded, return them to the transfer track, charge the Santa Fe two dollars per car for the service, notifying it of the switching; the Santa Fe would take the cars, bill them to destination, collect all freight, and pay the Missouri Pacific its switching charges. In no instance did the Missouri Pacific issue bill of lading, way-bill, or receipt, or present or collect bills for freight or switching charges.

SIXTH.

"When the Santa Fe received cars loaded with wheat consigned to the Mill Company, it placed them on the trans-

fer track; the Missouri Pacific placed them at the mill; the Mill Company unloaded the wheat from them and reloaded them with flour, and the same practice was followed as in the case of empty cars brought in from the Santa Fe.

SEVENTH.

"In making its application to the Santa Fe for cars, in no instance did the Mill Company make a deposit of any part of the freight, and in no instance was a deposit of any part of the freight demanded. In receiving orders for furnishing, transferring or returning cars as hereinbefore outlined, in no instance was any distinction made between cars intended to be used in carrying flour to points out of the State, and cars intended to carry to points within the State of Kansas.

EIGHTH.

"The custom and practice described in the fifth and sixth paragraphs prevailed as to both empty and loaded cars from the time the transfer track was constructed uninterruptedly until Aug. 29, 1906; and prevails to the present time in favor of the Mill Company as to cars loaded with wheat consigned to the Mill Company; and still prevails in favor of all industries located on the Missouri Pacific at Stafford making shipments in or out over the Santa Fe in car-load lots, except the Mill Company."

As stated by the Supreme Court of Kansas in its opinion rendered in this case:

"These findings narrow the controversy to the matter of taking empty cars from the transfer track to plaintiff's mill and returning them when loaded.

"It is argued that no contract exists between the defendant and the Santa Fe relating to the use of the transfer track, and that the court cannot make one for them; that the defendant cannot be compelled to leave its own rails and its own right-of-way and go upon the rails and

property of others to perform carriage services; and that the relief asked would indirectly require the defendant to devote a part of its main line to the use of the Santa Fe as a terminal. This argument does not reach the merits of the case. Under findings eighth and ninth the only question is if the plaintiff shall be given the same service afforded to other industries located at Stafford.

"When the transfer track was built the defendant was under no obligation to do switching over it or from it either for the Santa Fe or for the shippers at Stafford. For the purpose of the discussion merely, it may be conceded that it could not have been compelled to do so; that it had the absolute right to restrict its business to the operation of its own line as it now restricts its service over the transfer track to the handling of freight cars. But it did not exercise its privilege. It voluntarily undertook to serve the public by switching cars just as it voluntarily undertook, in the beginning, to serve the public by operating its own road. It held itself out as a switching company, and undertook to handle all cars, loaded and empty, which the shipping interests of Stafford required should pass over the transfer track, although compelled to leave its own track and right-of-way in order to do so. It relied upon the implied contract of the Santa Fe to pay the value of the service performed. The Santa Fe participated in this public profession, and undertook to devote its property and resources to the proposed end. This conduct on the part of the two roads was in no respect *ultra vires*. It was in direct furtherance of the public purposes of their incorporation, and having held themselves out to the general public as ready and willing to render the service described, they assumed all the duties which the law imposes in view of the nature of the business and the customs incident to it. The defendant became, and under the findings still is, a common carrier of loaded and empty freight cars to and from the transfer track and its own

station a mile away. (*Missouri Pacific Railway Co. v. Grocery Co.*, 55 Kan. 525.)

"It is hornbook law that a carrier cannot renounce as against some disfavored shipper the public duty which it assumed when it engaged in the kind of transportation business which it offers to conduct. Being a common carrier for all, the defendant must switch all cars tendered for that purpose, including those intended for the Mill Company. It is equally elementary that a carrier may be compelled by mandamus to perform duties of this kind to an aggrieved shipper.

"The findings of fact show that the plaintiff has not forfeited the right it claims. It is unnecessary to inquire if a carrier may discontinue all further service to a shipper on account of past infractions of reasonable rules adopted to secure better service to the public. Rule IX of the Car Service Association does not provide for the infliction of any such penalty, but only requires that further deliveries shall be made on public delivery tracks and not at private sidings. Rule X in its application to this case, and the special order issued for the purpose of coercing the plaintiff, are not reasonable. A shipper ought not to be compelled to pay an unjust charge for car service with no redress but to submit a claim for the return of his money to the manager of the association promulgating the rule or order. The weight of authority seems to be that the carrier has a lien for compensation for the use of cars beyond reasonable free time. If the lien be waived, the courts are open. But the Car Service Association holds no franchise to compel the payment of claims of this kind, and then to decide for itself whether or not it will refund. And in any event a carrier cannot justly withhold its services when it is equally at fault in the matter of which it complains. (Finding Sixteenth.)

"The defendant claims that an order restoring to the Mill Company the service it formerly received would regu-

late interstate commerce so far as cars destined to points outside the State are concerned.

"It is plain that the taking of empty cars from the transfer track and placing them at the mill is nothing more than preparation for the act of interstate traffic which is to begin later. It needs a shipment of flour to initiate interstate commerce from the plaintiff's mill, and so long as the flour remains in the mill, commerce has not begun. The mere purpose to use the cars in the future is not enough. They must be loaded with freight which is put in course of exportation before State control over them is suspended. (*Norfolk & Western Ry. Co. v. Commonwealth*, 93 Va. 749.)

"After a car has been loaded and returned to the transfer track, the Santa Fe may for lawful reasons decline to receive it. If it does receive it, there is neither a consignee nor a destination for it until the Mill Company has given shipping directions. The preliminary stage has still not been passed. The movement from the point of origin necessary to interstate commerce not only has not begun, but may never begin. As remarked by Mr. Justice Bradley in the case of *Coe v. Errol*, 116 U. S. 517, 526: 'Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind.'

"The custody of the carrier is not impressed with the change which frees the goods from domestic control until after they have been finally released to it by the consignor for transportation to a destination fixed beyond the State line; and under the custom prevailing at Stafford this does not occur until the cars have been taken to the transfer track, received by the Santa Fe, and finally billed. In the case of *Coe v. Errol* already referred to it is said:

"'It is true, it was said in the case of the *Daniel Ball*, 10 Wall. 557, 565: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced." But this movement does not begin until the

articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.'

"There is still another test which may be applied. The Missouri Pacific engine for all practical and legal purposes simply takes the place of the plaintiff's teams in moving flour from the mill to the Santa Fe. Its work is that of switching cars. The service is purely local. It is independently contracted for. It has no relation to the contract of carriage by virtue of which the freight is removed beyond the borders of the State. It has no relation to the ultimate destination of the cars handled. It begins and ends before the destination of any car is fixed, and is in fact nothing but a preliminary incident to the interstate journey. This being true, it is subject to State control. (*Penn. R. R. Co. v. Knight*, 192 U. S. 21, and cases cited in the opinion.)

"The facts in the case of *Chicago, M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849, are in all essential respects analogous to those under consideration. The principles there applied are those which governed the decision of the Supreme

Court of the United States in the Knight case. The opinion reads:

"'The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road or side-tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills and deliver them to other lines of railway, or deliver cars to consignees received by it from other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the complainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar and fifty cents per car is exacted for this switching service rendered, which is claimed to be reasonable and just; but if the cars are to be transported over its own line to the point of destination, or come into the city over complainant's main road, the service is free, and this separate and distinct charge, when made, is only for this local switching. This charge is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment.

"'The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the State, in the same manner as the carriage by dray per load or distance, is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local, and there is nothing upon the face of the order of the commissioners indicating that it is intended to regulate interstate commerce. Even if it is conceded that this carrying of freight over the switches is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the constitution of the United States. It is not every

act that affects such commerce that amounts to a regulation of it, and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the State of Minnesota, and is not a part of it.'

"The case of *Central Stock Yards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, is cited by the defendant. The State of Kentucky attempted to seize upon shipments of live-stock in the course of transportation by the railroad company from a foreign State and compel their delivery to a connecting carrier in order that they might reach a particular stock-yard, although the transporting company provided adequate facilities for the delivery and care of stock at another yard in the same city. Manifestly that was an effort to regulate interstate commerce.

"The case of *McNeill v. Southern Railway Co.*, 202 U. S. 543, also cited by the defendant, is of the same character. The State of North Carolina undertook to control the disposition of freight while in transit from a foreign State. The following extract from the opinion is sufficient to show the inapplicability of the decision to the facts under consideration:

"'The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that State, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. (*Rhodes v. Iowa*, 170 U. S. 412.)' "

In the very late case of the *Gulf, Colorado & Santa Fe Railroad Company v. The State of Texas*, this court has decided the very question that is here for decision in this case. In that case it is clearly and expressly decided

that the intention or the purpose of the owners of an interstate shipment of a car-load of grain or other provisions, to forward such car from the original terminal point to another point in the same State, does not make the shipment between such two points, when performed by a connecting carrier, to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one and as such exempt from the regulations of the State Railroad Commission. So it must follow that the intention of the Larabee Milling Company to bill the cars over the Santa Fe Railroad after the cars were received by that railroad, to points without the State, would make no difference so far as impressing the transfer of the empty cars to the mill or the loaded cars to the Santa Fe tracks as an interstate transaction.

In the case of the *Gulf, Colorado & Santa Fe Railroad Company v. The State of Texas*, there was an interstate shipment from Hudson, South Dakota, to Texarkana, Texas, with the express intention of shipping the grain on to Goldthwaite, Texas. The grain was shipped from Kansas City over the Kansas City Southern Railway to Texarkana, where it was delivered at the command of the owner to the Texas & Pacific Railway, which was to carry the grain from Texarkana, Texas, to Goldthwaite, Texas, and this court held that no matter what the intention of the shipper was, the shipment from Texarkana to Goldthwaite was an intrastate shipment, not in any way con-

trolled by any Federal law in respect to interstate transportation. The language of Judge BREWER in rendering this decision is as follows:

"The corn was carried from Texarkana, Texas, to Goldthwaite, Texas, upon a bill of lading which, upon its face, showed only a local transportation. It is, however, contended by the railway company, that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and that its interstate character was not affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite.

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana,—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until

that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin company changed or offered to change the contract of shipment or the place of delivery. The Hardin company accepted the contract of shipment theretofore made, and purchased the corn to be delivered at Texarkana,—that is, on the completion of the existing contract. When the Hardin company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin company at Texarkana. Whatever may have been the thought or purpose of the Hardin company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the State within which that carriage was to be made.

"The question may be looked at from another point of view. Supposing a car-load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car,—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the State? To state the question in other words,—if the only contract of shipment was for local transportation, would the State law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to some place outside the State? (*Coe v. Errol*, 116 U. S. 517–527, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475.)

"Again, it appeared that this corn remained five days in Texarkana. The Hardin company was under no obligation to ship it further. It could, in any other way it saw fit, have provided corn for delivery to Saylor & Burnette, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin company. Then, and not till then, did the Hardin company have full title to and control of the corn, and that was after the first contract of transportation had been completed.

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin company. In many cases it would work the grossest injustice to a carrier if it could not rely

on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract.

"We see no error in the proceedings, and the judgment of the Supreme Court of Texas is affirmed."

As regards the proposition that the peremptory mandamus required the plaintiff in error to issue certain bills of lading, we have this to say: In the application for the writ, this relief was applied for, and the alternative writ so runs. But, on November 12th, 1906, the defendant in error filed with the Clerk of the Supreme Court, in this case, properly entitled, the following written application:

"*The plaintiff respectfully withdraws from the consideration of the court that part of the application for the writ of mandamus, to compel the defendant to issue certain bills of lading, leaving as the one issue to be tried the resumption of switching service by the defendant over the transfer track of the defendant.*

WATERS & WATERS, Attorneys for Plaintiff."

On this question of issuing certain bills of lading, no testimony whatever was taken; there was no instance shown by the proof that the plaintiff in error had ever issued a bill of lading or been requested to issue one; there

was no testimony as to the whereabouts of any shipment made, and on December 8th, 1906, when the court ordered the writ issued, the form of the alternative writ was copied and this proceeding was lodged in this court, before such error was detected. There never was a time before bringing this case here, that the plaintiff in error might not, upon the most casual suggestion to the Supreme Court of Kansas, have had this corrected.

Through the entire conduct of this trial, the answer of plaintiff in error, the testimony taken, the findings made, and the arguments of counsel, there has been no place or attention given the issue of bills of lading.

In the application for the writ, the Mills Company averred that the railway in every bill of lading issued by it, had the provision *that it was not liable for damages or shortage thereto*, and the original application was to compel bills to be issued without it. The railway company in this case desires everything construed against the lawful exercise of its authority by the State Supreme Court; they claim, while there was no transaction of interstate commerce before them, that all that the State Legislature or Supreme Court had in view was an interference with something neither had any right to touch. The Supreme Court of no State has such desire; and this court, we take it, in the absence of particular transactions, will be slow to infer that the State Court took, or intended to take, any other jurisdiction or power than might have been legiti-

mately taken, as was clearly intimated by this court in the *Pullman vs. Adams* case, 189 U. S. 422, already cited.

The record does not disclose this written withdrawal, but the attorneys for the plaintiff in error are charged with notice that it was filed for twenty-six days prior to the date of the decision awarding the peremptory writ.

The right to compel the railway company to issue certain bills of lading was not an issue at the final hearing, and the stress laid upon this feature of the case may seem to the other side a matter of necessity.

In conclusion, we urge, that before the railway company has standing here on questions of interstate commerce, the duty rests on it to show that such a controversy is involved, and that it cannot make a matter of substantive right here, that which called to the attention of the Supreme Court of Kansas would have been rectified, as a matter of course, upon the merest suggestion.

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MISSOURI PACIFIC RAILWAY COMPANY *v.* LARABEE FLOUR MILLS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 16. Argued November 11, 12, 1908.—Decided January 11, 1909.

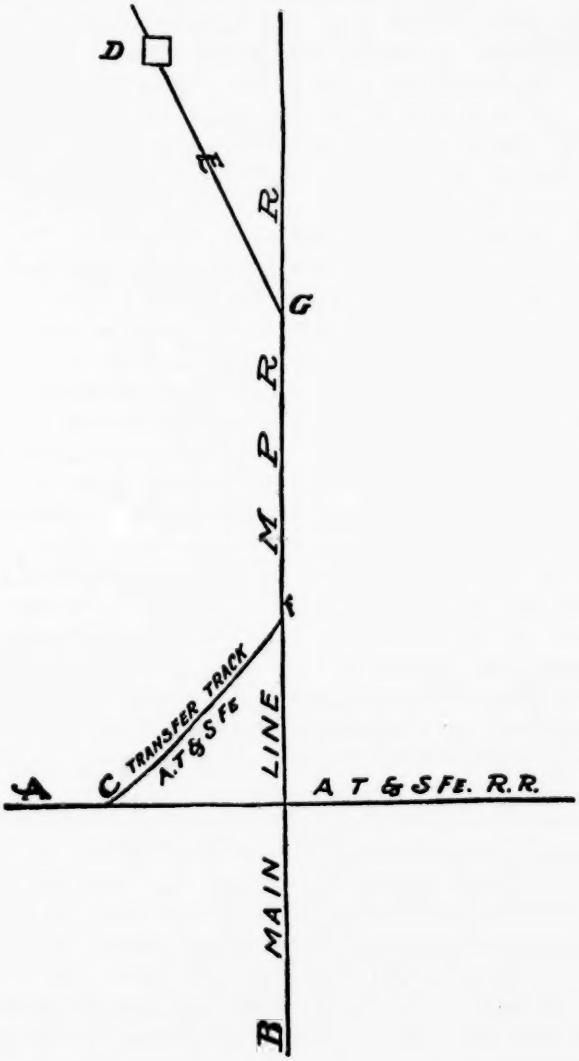
No one can be compelled to engage in the business of a common carrier, but if he does so, he becomes subject to the duties imposed on common carriers.

Even in the absence of legislative enactment or special contract a common carrier is bound to treat all shippers alike and can be compelled to perform this common-law duty by mandamus or other proper writ.

Notwithstanding the creation of the Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, a State may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce.

Where there has been no action by Congress or the Interstate Commerce Commission a state court may by mandamus compel a railroad company doing interstate business to afford equal local switching service to its shippers, notwithstanding the cars in regard to which the service is claimed are eventually to be engaged in interstate commerce. *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, distinguished.

ON September 15, 1906, the Larabee Flour Mills Company (hereinafter called the mill company) filed its application in the Supreme Court of Kansas for an alternative writ of mandamus, compelling the Missouri Pacific Railway Company (hereinafter called the Missouri Pacific) to restore, resume and make transfer of cars between the lines of the Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe) and the mill and elevators of the plaintiff, situated in the town of Stafford. The following diagram shows the location of the mill and railroad tracks:


D
E
R
G
M P R
F
C TRANSFER TRACK A.T & S Fe
A
LINE
A T & S Fe. R. R.
B MAIN

Line "A" represents the main line of the Santa Fe Railway Company; line "B" the main line of the Missouri Pacific Railway Company; line "C" the transfer track owned by the Santa Fe Company; "D" the mill of the Larabee company; "E" the spur track running from the main line of the Missouri Pacific Railway Company. The distance from "F" to "G" on the main line of the Missouri Pacific Railway Company is about one mile.

Upon the filing of this application and the answer and return of the Missouri Pacific the matter was referred to a commissioner, who reported his findings of fact, which, so far as are material to the questions presented, are as follows: Stafford is a flourishing town of 1,600 people, situated in the midst of a wheat-growing district of the State. The mill company has for more than four years been operating a flouring mill of 1,000 barrels daily capacity. About three-fifths of its product is shipped out of the State of Kansas into other States and the remaining two-fifths to points within the State. It receives a large portion of its grain in carload lots over the two roads.

The Missouri Valley Car Service and Storage Association (hereinafter called the car service association) is an unincorporated voluntary association of a number of railroad companies, having a manager and other employés. The object and the duty of this association is to represent and protect the interest and enforce the rights of the members thereof in the interchange of freight cars, the prompt loading, unloading and return of cars interchanged, or delivered to shippers, for traffic purposes. It had been in operation for many years, commencing prior to any of the transactions mentioned in this litigation. Its objects, operations and methods were generally understood by commercial shippers and acquiesced in as appropriate for securing to the shipping public the greatest amount of service over the roads composing it.

No express contract existed between the two railroad companies requiring either to use or to permit the other to use the transfer track, or requiring either to place empty or loaded cars

thereon to be taken away or returned by the other. Whenever the Santa Fe placed its empty cars for the mill company on the transfer track, the Missouri Pacific, upon notice thereof, hauled and delivered them at the mill on the siding connecting it with the Missouri Pacific. The Santa Fe and the Missouri Pacific both held themselves out as ready to do such and like transferring, and continued to do so after the controversy arose in this case for all industries located on the Missouri Pacific at Stafford, making carload shipments in or out over the Santa Fe, except the mill company. A controversy arose between the Missouri Pacific and the mill company as to two charges for demurrage; one for demurrage between December 12, 1905, and April 26, 1906, and the other between July 24 and August 14, 1906. Payment of both was demanded by the car service association. One of them, the mill company, offered to pay; the other it refused, on the ground that the delay and detention were not caused by its fault but by the defective, insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading. For a failure to pay both these charges the Missouri Pacific, by the direction of the car service association, ceased and refused to make further delivery to the mill company of empty cars placed on the transfer track for the use of the mill company by the Santa Fe, in consequence of which the mill company, when desiring to ship any of its products from Stafford by the Santa Fe, was compelled to haul the same in wagons from its mill to the station of the Santa Fe and there load into cars. This entailed upon the mill company great inconvenience and additional expense in the management of its business. The refusal of the Missouri Pacific was based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character.

The commissioner also found that the detention of the cars on account of which the demurrage charge was refused payment

by the mill company was caused as much by the defective motive power and insufficient train service of the Missouri Pacific as from any fault or omission on the part of the mill company.

The case coming on for hearing before the Supreme Court of the State a peremptory writ of mandamus was ordered, commanding the Missouri Pacific to immediately resume the transfer and return of cars loaded and unloaded from the line of the Santa Fe to and from the mill and elevator at the station and city of Stafford, upon the request and demand of the mill company, and upon payment of the theretofore customary charges.

Mr. Balie P. Waggener for plaintiff in error:

The referee finds that the mill company ships from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the State of Kansas, and into other States, etc. The same was interstate commerce, and beyond and not within the regulatory power of the State or the state court.

In the performance of this service for the Santa Fe company, the Missouri Pacific Railway Company was acting as a connecting carrier, or as the agent of the Santa Fe company. In no sense was it the agent of the mill company, performing for it a local service. As disclosed by the admissions of the mill company in its application for the writ, the empty cars were furnished by the Santa Fe company to the mill, to be there loaded, and three-fifths of all such cars so loaded were shipped from the mill out of the State. There was here no separation in fact between that which was wholly interstate and that which was wholly intrastate. *Johnson* v. *So. Pac. Co.*, 192 U. S. 21, 22; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 562; *Central Stock Yards* v. *L. & N. R. R. Co.*, 92 U. S. 570; *Rhodes* v. *Iowa*, 170 U. S. 412.

The shipments in question were under the exclusive control of the provisions and requirements of the Interstate Commerce Act. *Railway Co.* v. *I. C. C.*, 162 U. S. 940; *United States* v. *Terminal Co.*, 144 U. S. 863; *United States* v. *C. & N. W. R. R. Co.*,

157 Fed. Rep. 323, and cases there cited; *Johnson* v. *Southern Pac. Ry.*, 196 U. S. 22.

The railroad tracks, spurs, switches, terminals, depots and yards of the Santa Fe and Missouri Pacific companies at Stafford were instrumentalities of interstate commerce, and as such the regulation and control thereof vested exclusively in the Interstate Commerce Commission. The judgment of the state court is necessarily a regulation, not only of interstate commerce, but the instrumentalities of interstate commerce, within the meaning of the Federal Constitution. *Railway Co.* v. *I. C. C.*, 162 U. S. 211; Hepburn Act, §§ 1, 23 &c.; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hall* v. *De Cuir*, 95 U. S. 489; *Lottery Cases*, 188 U. S. 346, 375; *Dining Car Case*, 196 U. S. 21, 22; *Welton* v. *The State*, 91 U. S. 280; *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 9.

The whole subject-matter is fully covered by and included in the legislation of Congress, in its attempt to make laws "necessary and proper for carrying into execution" the express power "to regulate commerce with foreign nations, and among the several States, etc." These powers, having been "delegated to the United States by the Constitution," are exclusive of the States. In every conceivable way has Congress, by supplemental legislation, broadened and extended the scope and purpose of the original act to regulate commerce, and this court has given its approval of such legislation in the case of *Schlemmer* v. *Railway Co.*, 205 U. S. 1, and *Johnson* v. *Southern Pac. Ry. Co.*, 196 U. S. 1. See also *I. C. C.* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 123.

Mr. Joseph G. Waters and *Mr. Charles Blood Smith*, with whom *Mr. W. H. Rossington*, *Mr. Clad Hamilton*, *Mr. John F. Switzer* and *Mr. John C. Waters* were on the brief, for defendant in error:

The findings show that the service affected by the state court's judgment is purely local and intrastate. The placing of empty cars at the mill for loading by the milling company

and the returning the same, when loaded, to the Santa Fe switch is purely a local facility whereby haulage between the two railroads is obviated.

Although a railroad company may be largely engaged in interstate commerce, it is amenable to state regulation and taxation as to any of its service which is wholly performed within the State and not as a part of interstate commerce. *Penna. R. R. Co.* v. *Knight*, 192 U. S. 21; *Coe* v. *Errol*, 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 84; *I. C. C.* v. *D., M. & G. H. Ry. Co.*, 167 U. S. 633; *G., C. & S. F. R. R. Co.* v. *Texas*, 204 U. S. 403.

The judgment of the state court is not a regulation of interstate commerce within the meaning of the Federal Constitution. *W. & M. & P. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Hopkins* v. *United States*, 171 U. S. 578.

The Hepburn Act does not operate to withdraw all interstate railroads from state control, and if such were its effect it would be in conflict with numerous decisions of this court. *Gibbons* v. *Ogden*, 9 Wheat. 194, 195; *Passenger Cases*, 7 How. 400; *Sinnott* v. *Davenport*, 22 How. 243; *Trade Mark Cases*, 100 U. S. 82; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 565; *Hall* v. *De Cuir*, 95 U. S. 485; *Railway Co.* v. *Mississippi*, 133 U. S. 587; *Plessy* v. *Ferguson*, 163 U. S. 537; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 209 *et seq.*; *The Daniel Ball*, 10 Wall. 564.

No argument in favor of the theory of exclusive Federal control can be predicated upon the theory of inferred powers under the Constitution and outside of the express and enumerated powers of the Constitution. This is a government of enumerated powers. It is true as a general proposition that all means necessary to the carrying out of these enumerated powers exist in Congress within the fair implication of the powers granted, but such implications may not be used, however apparently needful and expedient they may seem to be, to annul a plain reservation from or limitation upon the exercise of such enumerated powers. See discussion of these questions

in *Kansas* v. *Colorado*, 206 U. S. 80, 93, and *Fairbank* v. *United States*, 181 U. S. 283.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

All questions arising under the constitution and laws of the State of Kansas are settled adversely to the plaintiff in error by the decision of the Supreme Court of the State. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in the opinion. This brings within a narrow range the controversy which this court is called upon to decide.

Coming directly to that, counsel for plaintiff in error contend that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board. Conceding this, it is also true that the Missouri Pacific was a common carrier, and as such was engaged in the work of transferring cars from the Santa Fe track to the mill company, and after this controversy arose continued like transfer for all industries located on the Missouri Pacific at Stafford, except the mill company. While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by

the courts. Neither is there any significance in the absence o a special contract between the Missouri Pacific and the mi company. It appears that the practice theretofore had bee for the Missouri Pacific to charge the Santa Fe for the transfe that the latter collected the total freight and paid the Mis souri Pacific its switching charges. There is no suggestio that the amount of this charge was changed in favor of an other shipper, and so long as that was so it was the charg which the Missouri Pacific was entitled to make for cars trans ferred at the instance of the mill company. If in the future change is made in behalf of shippers generally, undoubtedl that change can be made operative in respect to the mill com pany. Indeed, all these questions are disposed of by one well established proposition, and that is that a party engaging i the business of a common carrier is bound to treat all shipper alike and can be compelled to do so by mandamus or othe proper writ.

But the main contention on the part of the Missouri Pacifi runs along an entirely different line. It is that the Missour Pacific and the Santa Fe are common carriers, engaged i interstate commerce, and as such are subject to the control o Congress, and, therefore, in these respects not amenable t the power of the State. It appears from the findings tha about three-fifths of the flour of the mill company is shippe out of the State, while the other two-fifths is shipped to point within the State. In addition, the hauling of the empty car from the Santa Fe track to the mill was, if commerce at all commerce within the State.

The roads are, therefore, engaged in both interstate commerc and that within the State. In the former they are subject t the regulation of Congress; in the latter to that of the State, and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its do minion must be preserved. *Fairbank* v. *United States*, 181 U. S. 283. How the separateness of control is to be accomplished i is unnecessary to determine. Its existence is recognized in the

first section of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as well as in that of June 29, 1906, c. 3591, 34 Stat. 584, for each provides:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

This case does not rest upon any distinction between interstate commerce and that wholly within the State. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the State, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated by many cases.

Thus in *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power to Congress, but further that (p. 319):

"The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. *Sturges* v. *Crowninshield*, 4 Wheat. 193; *Houston* v. *Moore*, 5 Wheat. 1; *Wilson* v. *Blackbird Creek Company*, 2 Pet. 251."

In *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514, is a collection by Mr. Justice Brown, speaking for this court, of a number of these cases. We quote from the opinion (pp. 516–517):

"Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding

the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employés, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

"We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith* v. *Alabama*, 124 U. S. 465); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville &c. Railway* v. *Alabama*, 128 U. S. 96); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State (*Western Union Tel. Co.* v. *James*, 162 U. S. 650); forbidding the running of freight trains on Sunday (*Hennington* v. *Georgia*, 163 U. S. 299); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Company* v. *Fuller*, 17 Wall. 560); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville R. R.* v. *Kentucky*, 161 U. S. 677); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*N. Y., N. H. &c. R. R.* v. *New York*, 165 U. S. 628); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, Milwaukee &c. Ry.* v. *Solan*, 169 U. S. 133); and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & Allegheny Rail-*

road v. *Patterson Tobacco Company*, 169 U. S. 311). In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

See also *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626; *Wisconsin &c. Railroad Company* v. *Jacobson*, 179 U. S. 287; *Reid* v. *Colorado*, 187 U. S. 137.

On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. But it is further contended that this is

not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control, and in support of that, *McNeill* v. *Southern Railway Company*, 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here is presented, as heretofore indicated, the question of the power of the State to prevent discrimination between shippers, and the common law duty resting upon a carrier was enforced. This common-law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge.

We see no error in the ruling of the Supreme Court of Kansas, and its judgment is

Affirmed.

Mr. Justice Holmes. I concur in the judgment on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to state control. For this reason I have not found it necessary to make up my mind on the considerations that will be urged by Mr. Justice Moody, although I am inclined to agree with his views.

Mr. Justice Moody, dissenting.

I find myself unable to agree in the reasoning by which the judgment of the state court is affirmed. Upon the peculiar facts of this case, it is possible to say that the cars, whose transfer was directed, did not become the subjects of interstate commerce until they had been selected as such after their delivery upon the tracks of the Santa Fe Railroad. If the decision were put upon that ground, I should be silent.

But it is assumed that three-fifths of them were interstate shipments, and with respect to such shipments, I am constrained to believe that the judgment of the court below exceeded the power of the State. The division of the governmental power over commerce made by the Constitution, by which the control of interstate commerce is vested in the Nation and the control of intrastate commerce is vested in the States, together with the fact that both kinds of commerce are often conducted by the same persons and corporations through the same agencies gives rise to highly perplexing questions in practice. The regulation of carriers and other instrumentalities of commerce is constantly undertaken both by the Nation and the States, and the extent and limit of the respective powers vested in each government, as far as possible, ought to be accurately ascertained and declared. This is demanded imperatively by the orderly conduct of the vast transportation agencies which are engaged in both kinds of commerce. They ought not to be left uncertain as to the power to which they are responsible.

I venture to think that the weight of authority establishes the following principles: The commerce clause of the Constitution vests the power to regulate interstate commerce exclusively in the Congress and leaves the power to regulate intrastate commerce exclusively in the States. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the State may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power. *Gibbons* v. *Ogden*, 9 Wheat. 1, 204; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334; *Asbell* v. *Kansas*, 209 U. S. 251.

In the case at bar, upon the facts as they are assumed to exist, it seems to me that the judgment of the court below

directly regulated interstate commerce. If this is so, it is unimportant that the Congress has been silent. A power clearly withdrawn from the State and vested in the Nation, can no longer be exercised by the States, even though the Congress is silent. Where the Congress fails to act, the subject enjoys freedom from direct control.

The principles which I have stated have been recently applied by this court in the case of *McNeill* v. *Southern Railway Company*, 202 U. S. 543. I cannot escape from the conviction that that case requires a reversal of the judgment of the court below, so far as it assumes to direct the conduct of interstate commerce. In that case the place of business of a private corporation was reached by a spur track connecting with the main track of the railroad. It had been the custom of the railroad to deliver cars consigned to this corporation from the main track to the spur track. In consequence of a dispute concerning demurrage, the railroad refused to continue thus to deliver cars. The State Commission made an order requiring the railroad to deliver certain cars engaged in interstate commerce upon the spur track on payment of freight charges. The order was held to be a regulation of such commerce, and repugnant to the commerce clause of the Constitution. In that case the regulation affected the last stages of the interstate journey. In this case it affects the first stages of the interstate journey. But in each case the commerce which was regulated was interstate. In that case the order was issued by a Commission and in this case by a court. But nothing turns upon that distinction, for by whatever state agency the power is exercised it is void, because it exceeds the authority which may rightfully be conferred by the State upon any agency.

I am not ready to assent to the proposition that although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to

resort to that body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill case* that the order there "asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce." This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case.

I am authorized to state that MR. JUSTICE WHITE joins in this opinion.